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U.S. DECISION TO WITHDRAW FROM THE INTERNATIONAL COURT OF JUSTICE

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HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND INTERNATIONAL ORGANIZATIONS

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

OCTOBER 30, 1985

Printed for the use of the Committee on Foreign Affairs

ORIGINAL

U.S. GOVERNMENT PRINTING OFFICE
55-824 O WASHINGTON : 1986

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U.S. DECISION TO WITHDRAW FROM THE INTERNATIONAL COURT OF JUSTICE

WEDNESDAY, OCTOBER 30, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON HUMAN RIGHTS
AND INTERNATIONAL ORGANIZATIONS,
Washington, DC.

The subcommittee met at 10 a.m., in room 2200, Rayburn House Office Building, Hon. Gus Yatron (chairman of the subcommittee) presiding.

Mr. YATRON. Good morning.

The Subcommittee on Human Rights and International Organizations meets today to examine the U.S. decision not to accept the compulsory jurisdiction of the International Court of Justice [ICJ].

On October 7, 1985, the administration told the United Nations the United States will no longer accept the compulsory jurisdiction exercised by the International Court of Justice, commonly referred to as the World Court. This ends the 39-year-old policy, declared by President Harry S. Truman in 1946, under which the United States agreed to abide by the Court's decisions automatically. The United States will continue to deal with the Court on mutually submitted disputes involving commercial, legal, or border problems with other nations.

Fewer than one-third of the U.N. membership adhere to the compulsory jurisdiction of the World Court. Many other countries, including France, Italy, West Germany, China, and the Soviet Union, have refused to accept the Court's compulsory jurisdiction. Other member nations, including Great Britain and India, accept jurisdiction with specifically crafted reservations.

The impetus for the administration's retreating from the World Court was the case brought by Nicaragua against the United States now before the Court. Nicaragua charged the United States with illegally supporting paramilitary attack by rebels in Nicaragua and mining its harbors. The United States argued that the Court lacked jurisdiction and announced earlier this year it would no longer take part in the case.

The initial reaction by the administration to refute the Court's jurisdiction in the *Nicaragua* case followed by the latest action of denying compulsory jurisdiction on a permanent basis merit the close scrutiny of Congress, as well as the American people. Congress was not consulted prior to the administration's taking this very serious step. When considering the possible ramifications of

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the administration's position, it seems reasonable for this matter to have at least been debated prior to being implemented. America's commitment to preserving the rule of law, domestically and internationally, has been unwavering. Before we abandon our tradition of promoting and adhering to international law, whether out of frustration or disillusionment, we must attempt to remedy existing conditions.

In the World Court, and the United Nations in general, the United States faces a dilemma: How best to serve our own legitimate interests while, at the same time, maintaining a respected posture in the international arena. Whether the administration's position regarding the World Court signifies a further retrenchment from the U.S. postwar commitment to international law and organizations, and whether these actions are necessary to protect our vital security interests in today's complex world, are issues to be addressed by our distinguished witnesses. I look forward to hearing your expert testimony.

I would now like to call on the ranking minority member, Congressman Jerry Solomon. Jerry, do you have an opening statement you would like to make?

Mr. SOLOMON. Mr. Chairman, we have a number of witnesses, including our distinguished colleague, so I am not going to take up very much time with an opening statement. Suffice it to say that I am in strong agreement with the decision made by the Reagan administration to withdraw American acceptance of compulsory jurisdiction under the International Court of Justice.

Frankly, the fact that only 3 of the 15 judges presently sitting on the Court are from countries that accept compulsory jurisdiction unconditionally should tell us something, I think, especially in view of the fact that these judges are elected by the General Assembly and by the Security Council. It raises serious questions in my mind as to how seriously the United Nations itself believes in the Court, and I will have questions along that line a little later among other issues that need to be looked into.

Mr. YATRON. Thank you very much, Mr. Solomon.

I am now pleased to welcome our distinguished colleague, Congressman Jim Leach of Iowa, a former member of the subcommittee. Jim, we welcome you. Please proceed with your statement.

STATEMENT OF HON. JIM LEACH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. LEACH. I appreciate your holding this hearing, and, I as a member, am appalled sometimes at lengthy statements, but this is an extraordinarily important issue and I would appreciate the indulgence of the Chair to read a lengthier statement than I would otherwise.

Mr. YATRON. Without objection.

Mr. LEACH. Mr. Chairman, the recent decision of the administration to terminate U.S. acceptance of the compulsory jurisdiction of the International Court of Justice is deeply troubling for a society committed to the rule of law.

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The most fundamental issues of world politics today are, in the first instance, how we contain and constrain weapons of mass destruction, and in the second, how we can best advance the rule of law. To refuse any longer to submit compulsorarily political disputes to the World Court and abide by arbitration decisions of that body is to drive a stake into the heart of the rule of law. It symbolizes a retreat from post-World War II U.S. commitments to international law and international organizations and lowers the United States to the level of international scofflaw.

The administration appears, by choice and disproportionate to any provocation, to have abandoned the high ground that has characterized two centuries of American foreign policy. By quitting aspects of the Court, the administration has returned to the jungle that political philosophers since Hobbes and Locke have defined as a state of nature. Civilized society requires law and third party arbitration. Rules without judges are unenforceable. A system devoid of legal redress breeds cynicism and in the nuclear age jeopardizes civilization itself.

Adherence to the rule of law should be the hallmark by which democracies are distinguished from repressive political systems of both the left and right. We should never, by our disdain for international law and its sparse enforcement mechanisms, give totalitarian and authoritarian societies excuses for rationalizing terrorism and other illegal conduct.

The administration's decision not only symbolizes a retreat from post-World War II positions, it also symbolizes a retreat from support for the concept of international adjudication that dates back to the last century.

Building on a mid-19th century international legal movement, a Convention on the Pacific Settlement of International Disputes was adopted at the conclusion of the Hague Peace Conference in 1899. The Convention, to which the United States was a signatory, provided for a Permanent Court of Arbitration, consisting of judges drawn from the various parties to the Convention, who comprised the tribunals set up to deal with disputes. During Theodore Roosevelt's administration, Secretary of State Elihu Root, pressed, in 1907, at a second Hague Peace Conference for the creation of a permanent tribunal. Secretary Root's dream of a permanent court was not realized until the Permanent Court of International Justice was formed in the 1920's following the establishment of the League of Nations. Although every President from Harding to Roosevelt advocated U.S. adherence to the statute establishing the Permanent Court of International Justice, a small guard of Senate opponents stymied these efforts for a generation.

In the wake of World War II, efforts were renewed by a major segment of the world community to strengthen international law and order with the establishment of the United Nations and the new International Court of Justice. It is a matter of record that, despite United States and Soviet resistance, a majority of the nations involved in the drafting of the statute of the Court preferred to vest the Court with general compulsory jurisdiction. In the end, however, the optional compulsory jurisdiction provisions in the statute of the earlier Permanent Court of International Justice were retained in article 36(2) of the statute of the new court.

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On August 14, 1946, President Truman signed a declaration adopted by the U.S. Senate accepting the compulsory jurisdiction of the International Court of Justice except for three types of disputes: (1) disputes submitted by agreement to other tribunals; (2) disputes on matters under U.S. domestic jurisdiction, as determined by the United States itself; and (3) disputes on multilateral treaties unless other parties to such treaties agree to participate, or the United States agrees to proceed without their participation.

It is important to note that the American people, with memories of World War II still fresh in their minds, gave overwhelming support to the acceptance by the United States of the compulsory jurisdiction of the World Court. The report of the Senate Foreign Relations Committee at the time records the support of the American Bar Association, the American Society of International Law, the National Education Association, the National League of Women Voters, the American Veterans Committee, the American Association of University Women, and many other representative groups. The attitude of the Senate was articulated eloquently by Senator Thomas, chairman of the Senate Military Affairs Committee, who said on the Senate floor on August 1, 1946:

> The question is, Mr. President, Why should any nation, with a clear conscience, be afraid to take its case before the bar of international justice? Why should any nation which believes in government by law hesitate to accept the impartial judgment of the Court? Why should any nation, great or small, which wants to be fair in its dealings with others, avoid the settlement of legitimate grievances which other nations may have?
>
> Far too often in the past States have resolved their disputes by means of coercion and force, rather than reason and logic. Far too often the scales of international justice have been weighted on the side of troops, airplanes, and battleships. Far too often diplomatic pressure has been the instrument by which the great powers have achieved their national objectives. I am sure you will agree with me that differences cannot be settled on their merits if the courtroom is replaced by the arena of power politics and if justice is sacrificed at the altar of overwhelming might.

From 1946, when the United States voluntarily accepted the compulsory jurisdiction of the International Court of Justice, until recently, the U.S. position has been in support of the compulsory jurisdiction of the Court and, indeed, has centered largely on means of expanding the use of the Court. Particularly noteworthy have been recurrent efforts to repeal the Connally amendment to the U.S. declaration, whereby the United States determines for itself whether or not a matter falls within its own jurisdiction. Every administration from Eisenhower to Carter, Republican and Democratic, has urged repeal of the Connally amendment, in effect giving greater authority—not less—to the Court. In 1970, the then-Republican administration also introduced an agenda item at the United Nations aimed at promoting greater use of the World Court by the international community.

The recent initiative of the administration bucks this 40-year trend and moves the policy debate away from proposals to promote and expand the use of the Court toward a policy of retreating not only from the Court but from establishing a world leadership role model.

Six ironies of this policy stand out:

One, the administration is moving toward greater nationalistic isolationism on the Court issue than that espoused by the rough-

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riding administration of Teddy Roosevelt and in the anti-League biases of Coolidge and Harding.

Two, whereas Woodrow Wilson's dream of a League of Nations was undercut by a garrulous Senate, it is the executive rather than the more populist Congress which is, in this instance raising the fortress America flag.

Three, it is an administration which describes itself as conservative which is devaluing the ultimate conservative principle—the importance of the rule of law.

Four, it is Nicaragua, a country of limited strategic consequence with a government of dubious philosophical character, which has caught the administration with its philosophical house out of order. For the Sandinistas to have forced the administration to recant the deepest rooted American values is a profound setback, if not embarrassment, to our foreign policy.

Five, the administration has chosen the precise time when weapons of mass destruction have proliferated and international terrorism has raised its ugly head to new heights to shrink the injunction of law. Law and order is apparently a theme to be trumpeted in domestic, not international, politics, to be applied to bank robbers, but not to state-sponsored terrorists.

Six, few governments have armies that can stand up to the awesome military capabilities of the nuclear powers. But in the area of terrorism small autocratic states can compete on equal, and in some cases stronger, footing because acts of a terrorist nature are likely to be far less acceptable in democratic societies. Accordingly, democratic governments like our own have a vested interest in conforming our foreign policies as pristinely as possible to international law. Eschewing law is an open invitation for potential adversaries to mock legal norms, to our long-term disadvantage.

In a series of decisions—beginning with its April 1984 suspension of U.S. acceptance of the compulsory jurisdiction of the Court in disputes involving Central America, followed by its decision in January of this year to withdraw from further participation in the Nicaragua case, to the recent rejection in toto of the compulsory jurisdiction of the Court—the administration has abandoned four decades of unyielding American commitment to the World Court.

But the question raised by Senator Thomas nearly 40 years ago remains relevant: "Why should any nation, with a clear conscience, be afraid to take its case before the bar of international justice?"

Even if the Court were to hold against our policies in a particular instance such as Nicaragua, do not the assets of the Court's broadened jurisdiction far outweigh the liabilities? After all, acceptance of the Court's compulsory jurisdiction is a gauntlet laid down to the world's lawless. The Nicaraguan brief against the United States should not so color our decisionmakers as to blind them to the probability that we will be able to use the Court far more to our advantage than disadvantage in the future.

It also should not blind them to the potential of its use in the Central American morass. Implicitly, the administration lacks confidence that our policies in the region are legal. Can they be that confident that they are effective? Might it not be that lawyers with briefs could have as salutary an effect on conflicts in the region as armed intervenors? Terrorism to halt terrorism not only lacks

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legal and moral sanction; the evidence to date is that it is of doubtful efficacy.

The administration, however, by its recent actions, appears to have overreacted to the Nicaraguan dilemma and produced an implicit self-indictment of the very policies which the Congress on several occasions has repudiated. A number of arguments in defense of its decision have been advanced which merit response. First, I find it of little comfort that the United States in rejecting compulsory jurisdiction will now be in the same posture as the Soviet Union and its allies. It is not a position, one would have thought, that any American administration, especially this one, would covet. Do we not understand that the law in the long run is on our side and the reason the Soviets have refused compulsory jurisdiction of the Court is a hard-headed assessment that it is not on theirs? Tragically, the difference between the United States and Soviet positions on the Court has narrowed not because the Soviets are changing but because the United States is taking the Soviet view that the ends of ideology justify extraordinary means—in this case, trashing the rule of law.

The administration, is, of course, correct that only 45 members of the United Nations accept the compulsory jurisdiction of the World Court, but to use this fact as justification for our withdrawal from such jurisdiction is unpersuasive. Those who do accept compulsory jurisdiction include Israel, the United Kingdom, Australia, Canada, El Salvador, and Japan, to name a few. The total number has not fluctuated radically since the days of the Permanent Court of International Justice and has never in the last 40 years exceeded 55 or so.

Since an overwhelming number of nations have never voluntarily submitted themselves totally and unqualifiedly to the compulsory jurisdiction of the World Court, it is hardly a new or convincing justification for withdrawing our own acceptance of compulsory jurisdiction. Furthermore, it is ironic for the administration to object to being in a minority in this instance when it is not reluctant about being in the minority—even a minority of one—on so many other issues before the United Nations. We should also bear in mind that the United Kingdom and the United States, as permanent members of the Security Council, have an advantage over other nations accepting the Court's jurisdiction by virtue of the fact that we have a veto to fall back on if there is a judgment of the Court we do not accept and another party seeks Security Council enforcement measures under article 94 of the U.N. Charter.

The administration has also objected to the use of the Court as a political weapon, an argument which likewise would seem insufficient to justify its recent decision. The pending case before the Court involving Nicaragua is the only case the administration has been able to cite to make this self-serving point. Only two other suits have been brought previously against the United States in the Court under the compulsory jurisdiction clause: the *case Concerning the Rights of Nationals of the United States in Morocco in* which the United States won on some points and the French on others, and the *Interhandel* case which was dismissed because the Swiss had not exhausted U.S. domestic legal remedies before taking the United States to the Court. Thus, until now, there has

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scarcely been an instance, much less a pattern, of political use of the Court to undermine U.S. national interests. The present *Nicaragua* case is the first time since the *Moroccan* case in 1952 where a suit against the United States has been heard on its merits.

The administration further points out that the United States has not been able to successfully sue others under the compulsory jurisdiction clause. What the administration fails to explain fully is that the Connally amendment, adopted by the United States, has permitted other countries to use it to escape actual or expected jurisdiction. In addition, United States attempts to sue some Soviet bloc nations have failed because those nations do not accept the compulsory jurisdiction of the Court. Thus, in no case does it appear that the United States has sued another nation accepting the compulsory jurisdiction of the Court, so it is difficult to determine whether such a suit would inevitably fail.

Some U.S. critics of the Court argue that because it includes jurists from member nations considered to be hostile to the United States, the Court will inevitably be unable to reach an impartial judgment. Several observations should be made with respect to this claim. Despite the fact that jurists elected by the Security Council and General Assembly are not intended to serve as the official representatives of their home governments, it can realistically be expected that some from societies hostile to the United States may be constrained in their decisions by nonlegal factors, but such judges do not constitute a majority. The list of countries from which the present roster of judges comes includes: the United States, the United Kingdom, France, Norway, Japan, Italy, Argentina, Brazil, Nigeria, India, China, Senegal, Algeria, Poland, and the Soviet Union. Some of the jurists from non-Western nations have spent time at Western institutions of law such as, for example, the judge from China who studied at Stanford and the judge from Nigeria who studied at the University of London. Furthermore, to argue too strongly that the nationalities of the judges preclude an impartial decision is to undermine the rationale for continuing to accept the Court's role under article 36(1) covering treaties and agreements in which the Court is given explicit jurisdiction to resolve disputes. According to the administration, the United States is party to more than 60 such agreements and will continue to accept the Court's role in such disputes. If the Court, according to these critics, is too political to handle cases under compulsory jurisdiction, what is to prevent it from reaching political judgments in cases under article 36(1)?

It is important to note too that some Third World governments are wary of the Court for precisely the opposite reason some Americans are wary of it; they see the World Court as a Western legal creation and, therefore, to be avoided when seeking a resolution of their disputes. And, if one were to argue too strongly that the Court has an anti-Western bias, how do we explain the reasons for the Soviet and much of the Eastern bloc refusal to accept the compulsory jurisdiction of the Court?

It has also been argued that it is an outrage that some of the judges on the Court come from nations which do not accept its compulsory jurisdiction. Since judges are to be elected according to their ability and competence, not whether their home governments

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have certain policies, this concern doesn't strike me as overly problemsome. Judges, after all, must hear cases not only involving compulsory jurisdiction but also cases arising under special treaty provisions or other arrangements. In addition, a Westerner might be expected to prefer some judges from countries which do not presently accept the compulsory jurisdiction of the Court, such as West Germany, than judges from certain other countries which have accepted jurisdiction, like Kampuchea.

Finally, it is also interesting to note in the current *Nicaraguan* case that although the American judge has voted in favor of the U.S. Government's position on certain aspects of the case, on other issues the U.S. judge has voted against the U.S. Government's position, for example, on the issue of justiciability and on the Court's provisional injunction against further mining of Nicaragua's ports. In the 1980 ICJ decision on the Iranian hostages case, it is interesting to note as well that the Soviet judge, although clearly a dissenting voice on certain aspects of the Court's final decisions, did vote with the rest of the Court in favor of the United States in deciding that the Government of Iran must immediately end its unlawful detention of the American hostages.

It is unfortunate that this subcommittee must spend its time examining the retreat made by the administration from the jurisdiction of the Court, rather than examining constructively the problems posed by the present procedures and constitution of the Court, and attempting to find ways in which those problems might be resolved. If we are indeed disappointed that so many others have failed to accept the compulsory jurisdiction of the Court, one might ask what the administration has done to explore the possibilities of encouraging other nations to become more forthcoming.

To the extent that the United States has identified certain defects or problems with the way in which the Court operates, one might also ask what steps the United States has taken to address those defects and to promote constructive change or reform.

Finally, Mr. Chairman. I would like to address the decisionmaking process by which the administration arrived at its present position. That there was virtually no congressional consultation is a worrisome fact and precedent. Many of us first learned such a policy departure was even under consideration in a story leaked to the New York Times the day before the new policy was announced. While the administration apparently felt no obligation to involve the Congress in this decision, and it is important to note that the U.S. declaration accepting compulsory jurisdiction, was not a treaty per se, it was the consensus of the Senate at the time of the debate on the subject of U.S. adherence, that the issue was of such importance that it should be handled as if it were, in fact, a treaty, thereby paving the way for a two-thirds vote of the other body. The State Department also indicated in 1946 that either the procedure finally used or an alternative procedure whereby a majority of the Senate and the House both voted for the declaration would constitute the necessary authorization for the President to submit the declaration to the Secretary General of the United Nations.

While the Constitution is silent on procedures for terminating treaties or other international agreements, and the practice to date on the actual termination of international agreements is mixed,

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with varying degrees of congressional involvement and noninvolvement, I believe the case before us today, as in the earlier instances of the administration's suspension of U.S. acceptance of World Court jurisdiction on Central America cases and the withdrawal of the U.S. membership from UNESCO, presents important challenges to the constitutional prerogatives of the Congress. While we in the House cannot presume to speak for the other body, it is important to remember that article VI of the Constitution of the United States gives treaties the same status as the laws of this nation. No administration can undo domestic law without congressional sanction. Why then should an administration believe itself legally competent to effectively amend or terminate treaties which have the force of law? In a republican form of government decisions of this magnitude should not be entrusted to one person, however lofty his position. Such a policy takes on a particular tone of arrogance when the executive branch refuses to even consult with the legislative branch of government on an issue of such profound philosophical import.

Mr. Chairman, this decision of the administration was made in a congressional vacuum, but against the backdrop of decisions to torpedo the Law of the Sea Treaty and abandon UNESCO. I raise this perspective because I think it important to warn of the growing capacity of narrow single issue groups to influence not only domestic but foreign policy. Now is the time to ring the alarm bells in support not only of the rule of law, but for preservation of the institutional infrastructure of the U.N. system.

The ideological wagons appear to be drawing in a tighter and tighter circle around the White House. Neither the views of Congress nor a decent respect for the opinions of mankind seem to matter on certain issues.

Unfortunately, legal isolationism is not an abstract concern. It could not more ill suit the times nor ill suit history. For good or ill, the reality is that the United States will never again claim as great a percentage of the world's economic and military might as it did at the end of World War II. An ethnocentric foreign policy that restricts the development of international law is out of sync with current realities. Security in the 20th century cannot be unilaterally achieved. It cannot be realized by building walls around our country, by turning away from international organs of cooperation, and relying on arms to press our will on others. Fortress America isolationism will not make this nation safer or economically better off.

The challenge for government in a democracy is to establish laws that deserve respect and for the citizens to follow laws even when they find them inconvenient. But law, to be respected, must constrain the behavior of governments as well as citizens. Today the greatest threat to world order is the anarchy implied when governments themselves refuse to follow the rules and refuse as well to submit to the kind of discipline necessary to make law enforceable rather than simply hortatory. The only way to tame the jungle is to expand the rule of law. The United Nations and World Court beacon may be dim, but it is better than none at all.

Accordingly, I am convinced that the administration's latest move deserves a firm response from Congress. As you know, with Congressman Seiberling and Congressman McHugh, I have intro-

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duced House Conference Resolution 208 deploring the administration's decision and reaffirming the support of the Congress for international law and the World Court.[1] We have since obtained the cosponsorship of an additional 43 members, including 12 members of the Foreign Affairs Committee. I would hope, Mr. Chairman, that the subcommittee would consider House Concurrent Resolution 208 favorably and report it to the full committee for further action.

Thank you for this opportunity to testify.

Mr. YATRON. Thank you very much, Congressman Leach, for an excellent statement. I have no questions.

I now call on the ranking minority member, Mr. Solomon.

Mr. LEACH. I am sure you are in full agreement.

Mr. SOLOMON. Mr. Chairman, I don't know quite where to start, especially being of the opinion that Ronald Reagan is the greatest President this country has ever had, and we sit here and listen to these comments.

I would just say to the gentleman, I used to be a Harry Truman Democrat. Sometime around 1968 or so I switched to the Republican Party because I felt the American people ought to have an alignment of liberals with the Democrats, which is the way the Democratic Party was moving, and it gave the American people a choice.

Enough of that little thing, but let me just also say that I was somewhat taken aback by Congressman Leach's negative reference on page 2 to the rough-riding administration of Teddy Roosevelt. I would remind everyone here that Teddy Roosevelt, who advocated speaking softly and carrying a big stick, is, along with Woodrow Wilson, the only President of the United States of America to ever be awarded the Nobel Prize for Peace. So I find this remark to be an unfortunate slur against a great American, a great Republican.

I would be glad to yield.

Mr. LEACH. That statement was intended to be a compliment of Mr. Roosevelt and to point out where Mr. Reagan has differed from Mr. Roosevelt's administration. Mr. Roosevelt supported the efforts at the time to establish a World Court, and Mr. Reagan has taken the position of suggesting that the jurisdiction of the Court be shrunk.

Mr. SOLOMON. With all due respect, and I do respect my colleague even though I don't agree with his philosophy, that is not the way I read page 2 when it talks about the six ironies of these policies.

I was taken aback by another reference on page 2 to the dubious philosophical character of the Nicaraguan regime. Since 1981, the Sandinista regime has been declaring itself Marxist and Leninist. If there is any doubt in anybody's mind, we only need to look at the further repression of civil liberties announced in just the last 2 weeks. I think it requires a deliberate effort nowadays not to recognize the nature of the Sandinista regime.

On this World Court issue, and I guess I would ask a rhetorical question to that end, I have a publication here in front of me that

[1] See appendix 1.

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is entitled "Basic Facts About the United Nations." The gentleman knows I was appointed by the President to be a U.N. delegate for this fall session, which is quite frustrating but challenging to say the least. But in this publication, "Basic Facts About the United Nations," chapter 2 talks about peacemaking and peacekeeping. Yesterday, Ambassador Jeane Kirkpatrick told the subcommittee that the Soviets have deliberately placed their people in the Department of Public Information of the United Nations, which published this book. And in this book, I just look at what the United Nations has taken credit for, in the way of peacekeeping.

It starts off with Afghanistan. It goes on to talk about Cyprus, then Iran and Iraq, then Kampuchea, and it finishes up with Korea. I always thought the United States Marine Corps that I served in kept the peace in Korea and did a damn good job. I don't think the United Nations had much to say about it.

My point is that in this book, which describes the accomplishments of the United Nations, in 42 pages it mentions the World Court only once, and that is only a reference to a responsibility for adjudicating cases under the Law of the Sea Treaty, which we haven't even signed.

I look at the makeup of the World Court that my colleague and my chairman mentioned, and there are 15 memberships. Of the 15, there are 3 countries that accept compulsory jurisdiction unconditionally—3. These are Nigeria, Japan, and Norway. Three out of fifteen.

Then there are countries that accept compulsory jurisdiction on certain conditions and that is two countries, India and Great Britain. And then we have countries that do not accept compulsory jurisdiction at all, and there are 10 of them. Two-thirds of the Court, of the World Court, don't even accept compulsory jurisdiction.

Listen to those countries: Italy, the United States, Algeria, the Soviet Union, Brazil, Argentina, France, Senegal, Poland, and China.

Now, how effective really can the World Court be? I guess my question is, why doesn't the United Nations itself have more to say about the ICJ and its accomplishments than simply having the right to oversee the Law of the Sea Treaty? I just don't understand this criticism of the Reagan administration's decision. I think, if anything, the action they took may lead to perhaps some meaningful movement where the ICJ could really become effective some day. I don't look at it as having an adverse effect. I don't really have a question. I guess it doesn't require an answer.

Mr. LEACH. I appreciate your perspective. I would only caution on one point. The comment I made about the dubious philosophy of the Nicaraguan Government was intended as pejorative, not as complimentary. I don't want the implication left I was saying something positive about the character of the Nicaraguan Government.

Mr. YATRON. Mr. Smith.

Mr. SMITH. No questions.

Mr. YATRON. We thank you very much for being here today and for giving us the benefit of your views. It will be very helpful to the subcommittee, Congressman Leach.

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Our next witness is the Honorable Abraham Sofaer, legal adviser at the Department of State. Judge Sofaer, we welcome you. You may proceed whenever you are ready.

STATEMENT OF ABRAHAM D. SOFAER, LEGAL ADVISOR, DEPARTMENT OF STATE

Mr. SOFAER. Thank you very much, Mr. Chairman.

I have prepared a written statement, Mr. Chairman, and with your permission, I would ask it be made part of the record. I would Then summarize it rather than read it.

Mr. YATRON. Without objection, your entire statement will be printed into the record. You may proceed.

Mr. SOFAER. Thank you.

This is my first appearance before this distinguished body, and I welcome the opportunity to discuss the President's decision to terminate our acceptance of the compulsory jurisdiction. That decision was implemented on October 7, when the Secretary of State, at the President's instruction, deposited with the Secretary General a note to that effect. That action was supported by both the Secretary of State and the Attorney General of the United States.

It followed, I might say, Mr. Chairman, a long period of deliberation—open deliberation—about this issue. The President had announced last January that we would not participate further in the Nicaragua case, and that we were considering what other measures ought to be adopted. In the international legal community there were conferences, and papers were written. Many such papers came to my attention and I read them. We studied all aspects of the question and came to our decision after all that deliberation.

Now, the ICJ, as we all know, is a court of limited jurisdiction, based on its statute and on the consent of states. Our decision does not affect jurisdiction under article 36(1) of the Court's statute. Under that article, states can, by special agreement, submit disputes to the Court. We have just agreed with Italy to submit a very important commercial dispute involving the Ratheon Corp. And indeed when we made the decision not to participate any longer in the Nicaraguan case, we had just been before the Court in a dispute with Canada over our maritime boundary, and any Congressman who comes from a State with a boundary that is in question knows how sensitive and important those issues are.

So we are not avoiding the Court on sensitive or important questions, or indeed even political questions, with respect to those matters which states agree to take to the Court.

The second basis is what we are talking about now, and that is the Court's compulsory jurisdiction, the so-called optional clause. I gather, Mr. Chairman, the committee is aware of how a state submits itself to the compulsory jurisdiction of the Court, so I will skip over that, and I will just note that a state is free under international law to terminate or to modify its acceptance of compulsory jurisdiction in accordance with that state's perception of its national interest.

The action taken by the President to terminate the 1946 declaration is not only consistent with our international legal obligations, it is consistent with the terms of the 1946 declaration itself, which

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expressly provides for its termination on 6 months' notice to the Secretary General.

The President can terminate a treaty obligation unilaterally, so his authority to terminate lesser instruments, such as the 1946 declaration, is unquestionable.

The chief factor motivating the administration's review of our acceptance of the Court's jurisdiction was indeed our experience with the Nicaragua case. The reason, however, that led to the termination was not as Congressman Leach suggested, the positions of Nicaragua. Any state can come forward and make all kinds of preposterous assertions, and use an international body as the forum for a public relations war against the United States.

What was of concern to us was what the Court did with those arguments, not what those arguments were in themselves. We believe we have the better part of those arguments and the State Department issued just 3 weeks ago a paper that collects the evidence of Nicaragua's aggression against El Salvador and Honduras. Our case as a matter of law rested on our claim of collective self-defense which their aggression, in effect, establishes. So it wasn't their claims that caused us to make this decision, it was the Court's treatment of those claims which gave us concern.

First, the Court departed from its traditional, careful look at jurisdictional issues. It accepted jurisdiction over Nicaragua under circumstances that we feel would have led to a rejection of jurisdiction had we sued Nicaragua, since it wasn't at all clear Nicaragua had accepted the compulsory jurisdiction of the Court. Then the Court went on and took jurisdiction over a case which involves claims of an ongoing use of force without really coming to grips with the philosophical and practical implications of that jurisdictional decision.

Indeed, Mr. Chairman, I think that the door is still open for the Court effectively to reverse that decision. They have still not really come to grips with their authority to rule on a case of ongoing use of force. But, insofar as we can tell, that is what the law now is, as established by the ICJ, and that, of course, gives us great concern.

We looked at various factors that have been mentioned here in addition to what the Court actually decided. For example, only 46 of 162 states have accepted the Court's compulsory jurisdiction, a lesser proportion than in the 1940's. But we also looked at the fact that nine of the states whose nationals are judges on the Court have not accepted the Court's compulsory jurisdiction. Many of those states are either from the Soviet bloc or vote consistently with the Soviet bloc in international organizations on issues bearing on our national security.

So the dream of 1946, the hope that the world would ultimately come to the point where most or all states would submit to the Court's compulsory jurisdiction simply has not been realized.

We also looked at the fact that compulsory jurisdiction is a relatively unimportant aspect of the Court's work as a dispute resolver on the international scene. We have supported international dispute resolution more than any other state in the world, and we are going to support international dispute resolution more than any other state in the world in the future. We do distinguish between the Court's compulsory jurisdiction and its much more important

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role as a resolver of disputes submitted by agreement between states.

We also considered the fact that our 1946 declaration is essentially useless to us. We have never been able successfully to sue any state under that declaration, because of the Connally reservation, and because other states that take actions that affect our interest, and that we would want to take to the ICJ, simply don't accept the ICJ's jurisdiction.

We tried to shame the Soviet Union into accepting jurisdiction, at least for particular cases, by suing them under the Court's former rules that permitted suits to be initiated against states that had not already accepted compulsory jurisdiction. But that did not work, Mr. Chairman, since the Soviets never accepted the invitation to submit to the Court's jurisdiction for those cases.

In 1957, when Bulgaria asserted our Connally reservation as a defense to jurisdiction we had to fold our tent and walk off. This demonstrated that the Connally reservation fatally flawed our acceptance of the compulsory jurisdiction. Indeed, eminent lawyers and judges have said that we really had no acceptance to terminate here. They reason that we never really submitted to the Court's compulsory jurisdiction, because the Connally reservation, by reserving to us the unilateral authority to terminate any case by saying it involves our domestic jurisidiction, made the 1946 declaration insufficient, as a matter of law, to constitute a submission to compulsory jurisdiction. We weighed that factor, among others, in coming to this decision. In short, our submission is valueless to us and may even have been insufficient as a matter of law in any event.

The self-judging nature of the Connally reservation wasn't the only thing we looked at. There was also the problem that states can take advantage of our acceptance by suing us even though they had not previously submitted to the Court's jurisdiction, the so-called sitting duck problem. That has not occurred yet, but it is a flaw in our acceptance that has not been adequately addressed.

None of these risks and limitations is new, and even though they are very substantial, they would not have led us to terminate our acceptance of compulsory jurisdiction despite its genuine lack of any utility to us. But taking these matters into account, we were led to change our policy by the Court's disturbing actions in the *Nicaragua* case. Not only did it disregard the careful attention that it used to pay to jurisdictional issues, it, as I told you, took jurisdiction over a controversy involving claims of an ongoing use of armed forces.

The particular situation before the Court in the *Nicaraguan* case was assigned by the Security Council to the Contadora process for resolution, a place where people can talk about issues of this kind in a reasoned way in an attempt to resolve them.

Now, the record of the Court's actions is such that we felt that we had to appraise the strategic significance of what the Court had done. Despite our deep reluctance to do so, Mr. Chairman, and the many domestic and constitutional constraints that apply, our nation must retain the option to use force in our self-defense and in the defense of our friends and allies.

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We are a law-abiding nation. I think the notion that is being bandied about that we are rejecting the rule of law by terminating our compulsory jurisdiction declaration before the ICJ, or that we are rejecting world order by walking out of UNESCO, is worse than frivolous. We are a law-abiding nation. We are the Nation out there fighting for law and order, fighting terrorism in the world through action and through lawmaking extradition requests doing all the real things that would bring about law and order in the world. So it is preposterous to call us anything but what we are. We are by nature and by our conduct a law-abiding Nation.

Now, as a consequence of our character, when we submit ourselves to a court, we abide by what the court tells us we have to do. And for the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense, therefore, is effectively to surrender to that body the power to pass upon our efforts to guarantee the safety and security of this nation and of its allies.

This development was of particular concern to us for reasons bearing directly upon the capacity of the ICJ to reach sound, correct decisions on use of force issues and to enforce on our Communist adversaries the principles the Court eventually developed.

The Court has no expertise on finding facts about ongoing hostilities. As a former trial judge with involvement in complicated cases, I doubt the 16 judges on the *Nicaragua* case could resolve the evidentiary problems presented there. Furthermore, that Court rejected the intervention of El Salvador, an indispensable party to developing an evidentiary record even at the jurisdictional phase. Even if the Court were inclined to allow participation by all necessary parties, it has no power to compel that participation. We have no doubt that Cuba and probably the Soviet Union have helped Nicaragua in the latter's efforts to subvert the democratic regime in El Salvador. Neither Cuba nor the Soviet Union can be expected to join in the proceedings in view of their consistent refusal to submit to the Court's jurisdiction. The Court cannot force them to do so.

The Court's lack of jurisdiction over the Soviet bloc nations has long-term significance for the strategic acceptability of ICJ review of self-defense issues. The Soviets have long advanced the view, through the Brezhnev doctrine and in other ways, that their actions in Czechoslovakia, Afghanistan, and places like that are perfectly lawful because they are attempting to keep a nation in the socialist orbit or to promote some socialist revolution, which all serves the purpose of their definition of freedom.

We believe that that is totally unsupportable by the U.N. Charter and not acceptable under international legal principles. Indeed, we believe when a nation asserts a right to use force illegally, and acts on that assertion, other affected nations have reciprocal rights to the extent necessary to offset and counter such illegal activities.

We cannot, however, rely on the ICJ properly and fairly to decide such questions. To the extent that the Court were to make decisions that limited our ability to confront the Soviet Union in its expansionism, we would be bound by those principles even though the Soviets could and would do as they pleased. The fact that most of the Court's judges come from nations which do not

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submit to its jurisdiction, including from Soviet bloc nations and other states that routinely support that bloc, is of special concern from the standpoint of these fundamental issues of national security.

This is not just a commercial dispute, Mr. Chairman. These issues go to matters that our Constitution assigns to the President and to the Congress of the United States. So I would urge you, Mr. Chairman, and this subcommittee, in considering this complex and important issue, to weigh carefully the national security implications of acceptance of the Court as a forum for resolving use-of-force questions. Consider those instances in which we have confronted the Soviet Union, or state-supported or independently operated terrorist organizations, and ask yourselves whether the ICJ would be the appropriate place for the United States to resolve questions about the legality of its use of force in such situations where these other states, or these other people, are not subject to the Court's orders and to any enforcement mechanism that the Court or the United Nations might establish.

We carefully considered modifying our 1946 declaration as an alternative to its termination. We concluded that modification would not meet our concerns. No limiting language that we could draft would prevent the Court from asserting jurisdiction if it wanted to take a particular case, as in the Court's treatment of our multilateral treaty reservation in the *Nicaragua* case demonstrated.

Furthermore, the mere fact of having a declaration on file would be enough for the Court to issue an indication of provisional measures against the United States whether or not the Court later found that it had jurisdiction under the declaration. The *Nicaragua* case for the first time gave us these special new concerns that had not existed in the past.

Finally, the 1946 declaration expressly provides only for its termination, and we would not wish to have the legality or effectiveness of any lesser step open to question. So, our decision, Mr. Chairman, is based on in-depth consideration of the relevant concerns. It does not signify a lessening of our traditionally strong support for the Court in the exercise of its proper functions, much less a dimunition of our commitment to the rule of international law.

We recognize, Mr. Chairman, that this Nation has a special obligation to support the ICJ and all other institutions that advance the rule of law in a world full of terror and disorder. Our belief in this obligation is what led us to set an example by accepting the court's compulsory jurisdiction and by continuing that acceptance long after it became clear the world would not follow suit and that our acceptance had failed to advance our interest in any tangible manner.

Yet the President is also responsible to the American people and to the Congress to avoid potential threats to our national security. The ICJ's decisions in the *Nicaragua* case created real and important additional considerations that made the continued acceptance of compulsory jurisdiction unacceptable, despite its symbolic significance.

We hope that this action will in the long run—as Congressman Solomon noted earlier in his statement—serve to strengthen the

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Court in its proper role in the international system established by the Charter and the Court's own statute.

Thank you. I would be happy to answer any questions.

[The prepared statement of Abraham D. Sofaer follows:]

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PREPARED STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Chairman, Members of the Subcommittee, this is my first appearance before this distinguished body as Legal Adviser of the Department of State. I welcome this opportunity to discuss with you the background to the Administration's recent decision to terminate the United States acceptance of the compulsory jurisdiction of the International Court of Justice.

On October 7 the Secretary of State deposited with the Secretary-General of the United Nations a note terminating the U.S. acceptance, effective six months from that date, of the Court's compulsory jurisdiction under Article 36(2) of the Court's Statute. I believe it would be useful to spend a few minutes on what results this action will have, and what remains unaffected. I will then turn to some of the reasons that led the President to decide on this course.

The ICJ is a court of limited jurisdiction, based on its Statute and on the consent of States. Under Article 36(1) of the Court's Statute, the ICJ has jurisdiction when the parties sign a special agreement referring a dispute to the Court or are parties to a treaty providing for ICJ dispute resolution. The President's action does not affect this basis for jurisdiction. Indeed, we have just agreed with Italy to submit an important dispute, involving millions of dollars, to the Court for adjudication. We are also party to some 60 treaties providing for adjudication of disputes by the ICJ.

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The second basis for ICJ jurisdiction exists when a State accepts the Court's compulsory jurisdiction under Article 36(2)--the so-called "optional clause", historically the less significant basis for bringing cases before the Court.

A State accepts compulsory jurisdiction by depositing a declaration whereby it holds itself open to suits by any other State depositing a similar declaration. In return, that State may bring suit under compulsory jurisdiction against any other State filing such a declaration. A declaration covers any issue of international law, except to the extent that it excludes from its coverage specific disputes or categories of disputes. Generally, a State has no way of knowing in advance by whom, or on what issue, a suit may be filed. A State faced with a suit under compulsory jurisdiction may invoke any exclusion in its declaration and, on the basis of reciprocity, any exclusion in its opponent's declaration, to seek to defeat jurisdiction. If any disagreement develops over the scope of a declaration or its exclusions, the Court itself decides the issue.

A State is free as a matter of international law to accept, or decline to accept, the Court's compulsory jurisdiction. A State that has accepted the Court's compulsory jurisdiction is likewise free to terminate that acceptance, or modify the terms and conditions under which it was made, whenever the State

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concerned believes that its interests would be best served by doing so.

The action taken by the President to terminate the 1946 U.S. declaration is thus entirely consistent with our international legal obligations. It is also consistent with the terms of the 1946 declaration itself, which expressly provide for its termination on six months' notice to the Secretary-General. Declarations under Article 36(2) of the Statute are not treaties under either international law or U.S. constitutional law. The President may take unilateral action to terminate a treaty obligation of the United States consistent with its terms; his authority is even clearer with regard to termination of lesser instruments such as the 1946 declaration.

The chief factor motivating the Administration's review of our acceptance of the Court's jurisdiction was our experience in the case instituted against the United States by Nicaragua in April of last year. The principal basis of jurisdiction cited by Nicaragua in bringing that case was the 1946 United States declaration accepting compulsory jurisdiction. We believed at the time, and still believe, that Nicaragua itself never had validly accepted the Court's compulsory jurisdiction. More important, Nicaragua sought to bring before the Court political and security issues that were never

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previously considered part of the Court's mandate. The Court's decision of last November to the effect that Nicaragua had indeed accepted compulsory jurisdiction, and that Nicaragua's claims were justiciable, was, in our view, insupportable as a matter of law and outside the permissible scope of the Court's power to resolve disputes concerning its jurisdiction. These considerations led the President to decide last January that we would no longer participate in the case.

These events also led us to engage in an in-depth evaluation of our 1946 declaration and its place in the system of compulsory jurisdiction established by Article 36(2) of the Court's Statute. We recognized, first of all, that the hopes originally placed in compulsory jurisdiction by the architects of the Court's Statute have never been realized, and will not be realized in the foreseeable future. The compulsory jurisdiction of the Court reflects a compromise struck by the framers of the UN Charter. Acceptance of compulsory jurisdiction was not made mandatory, but left to the option of States. We had hoped that widespread acceptance of compulsory jurisdiction, and its successful employment in actual cases, would eventually lead to its universal acceptance as confidence in the Court and in judicial settlement of international disputes increased.

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The hopes of 1946 have not been borne out by experience. Currently only 46 of the 161 States entitled to accept the Court's compulsory jurisdiction have done so; this represents a proportion of States that is substantially lower than in the late 1940's. No other Permanent Member of the United Nations Security Council except the United Kingdom now accepts compulsory jurisdiction. Neither the Soviet Union nor any other Soviet bloc State has ever accepted compulsory jurisdiction. Many of our closest friends and allies, such as France, Italy, and the Federal Republic of Germany, do not accept compulsory jurisdiction. What is more, many of the States that do accept compulsory jurisdiction have attached reservations to their acceptances so as to deprive them of much of their meaning.

For these reasons, compulsory jurisdiction cases have not been a major factor in the Court's overall jurisprudence. Of the approximately 50 contentious cases that came before the Court between 1946 and the end of 1983, 22 involved compulsory jurisdiction. Of these, however, only 5 proceeded to a final judgment on the merits, and the last of these, the Temple of Preah Vihear case between Cambodia and Thailand, was completed in 1962. In the remaining 17 cases, objections to the Court's jurisdiction under Article 36(2) were sustained in 13, and 4 were dismissed on other grounds.

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We found, secondly, that our 1946 declaration has never been of any practical value in terms of enabling us to bring other States before the Court. We have tried seven times to do so, each time without success. This is in part because, as I have noted, so few other States accept compulsory jurisdiction. In addition our 1946 declaration was potentially useless to us in every case because of the principle of reciprocity. As I have mentioned, a respondent State is entitled to invoke any reservation in the applicant State's declaration to seek to defeat the Court's jurisdiction. Our 1946 declaration is particularly vulnerable in this respect because of the so-called "Connally reservation." That clause of the 1946 declaration provides that the United States does not accept compulsory jurisdiction over any dispute involving matters essentially within the domestic jurisdiction of the United States, as determined by the United States. In other words, we reserve to ourselves the power to determine whether the Court has jurisdiction over us in a particular case. Any State we may try to sue could likewise avail itself of that power on a reciprocal basis.

This is, in fact, precisely what happened when we tried to bring suit against Bulgaria in 1957 on claims arising out of the loss of American lives and property when Bulgaria shot down an unarmed civilian airliner that had strayed into Bulgarian airspace. Bulgaria claimed that the Court had no jurisdiction

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because the matter in dispute was one within Bulgarian domestic jurisdiction as determined by Bulgaria. Even though we had pledged never to invoke our Connally reservation in bad faith to cover a manifestly international dispute, we were compelled to acknowledge that its invocation in any case would be binding in law. Hence Bulgaria's unconscionable reciprocal invocation of the Connally reservation forced us to discontinue the case.

On a more general level, the "self-judging" nature of the Connally reservation has been severely criticized by other countries, the international legal community and, indeed, by the Executive branch, from the very beginning. Some have even argued that the Connally reservation made the 1946 declaration a legal nullity because of its wholly unilateral and potentially limitless character. Certainly, that reservation substantially has undercut any example that the United States has tried to set for other countries by its acceptance of compulsory jurisdiction.

For these reasons we have never been able successfully to bring another State before the Court on the basis of our acceptance of compulsory jurisdiction. On the other hand, we have been sued under it three times: First by France in the Rights of Nationals of the United States in Morocco case in 1950-1952; second by Switzerland in the Interhandel case in 1957-1959; and finally, by Nicaragua last year.

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An additional weakness in our acceptance of compulsory jurisdiction is that nothing in it prevents another State from depositing an acceptance of compulsory jurisdiction solely for the purpose of bringing suit against the United States, and thereafter withdrawing its acceptance to avoid being sued by anyone in any other matter. This so-called "sitting duck" or "hit and run" problem has long been acknowledged by students of the Court as one of the principal disadvantages to the system of compulsory jurisdiction under Article 36(2). It places the minority of States that have accepted compulsory jurisdiction at the mercy of the majority that have not.

It is similarly ironic that States accepting compulsory jurisdiction undertake to submit themselves to a Court composed of judges, 9 out of 15 of whom come from countries that do not accept compulsory jurisdiction.

None of these risks and limitations is new. We had hitherto been prepared to endure them on the assumption that the respect that States owed to the Court, and the Court's own scrupulous adherence to its judicial role, would largely insulate us from abuses of the Court's process for political or propaganda ends. That assumption was rudely overturned by the Nicaragua case.

Several aspects of the Court's actions thus far taken in the Nicaragua case were disturbing. First, the Court departed

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from its traditionally cautious approach to finding jurisdiction. It disregarded fundamental defects in Nicaragua's claimed acceptance of compulsory jurisdiction that, in our judgment, would have prevented us from suing Nicaragua had we wished to do so. Furthermore, the Court engaged in unprecedented procedural actions, such as rejecting without even a hearing El Salvador's application to intervene as of right, that in our view betrayed a predisposition to find that it had jurisdiction and that Nicaragua's claims were justiciable regardless of our overwhelming legal case to the contrary.

More fundamentally, the Court for the first time in its history has sought to assert jurisdiction over a controversy concerning claims related to an ongoing use of armed force. The only prior case involving use-of-force issues was the Corfu Channel case, which only went to the Court after the complained-of actions had ceased and the United Nations Security Council had determined that the matter was suitable for judicial consideration. The Court in the Nicaragua case rejected, without a soundly reasoned explanation, our arguments that claims of the sort made by Nicaragua in its pleadings were intended by the United Nations Charter exclusively for resolution by political mechanisms, in particular the Security Council and the Contadora process, and that claims to the

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exercise of the inherent right of individual and collective self-defense were excluded by Article 51 of the Charter from review by the Court.

I cannot predict whether the Court's approach to these fundamental Charter issues in the Nicaragua case will be implemented in the Court's judgment on the merits. Nevertheless, the record to date gives us little reason for confidence. That record shows a Court majority that appears to be prepared to act in ways profoundly inconsistent with the structure of the Charter and the Court's place in that structure. That structure, as I have said, gives to the Security Council the responsibility for evaluating and resolving claims concerning use of armed force and claims of self-defense under Article 51. With particular regard to the situation in Central America, the Security Council has exercised that responsibility by its endorsement of the Contadora process as the appropriate mechanism for the resolution of the interlocking political, security, economic and other concerns of the region.

The fact that the ICJ has, at least tentatively, decided that it will hear claims about the ongoing use of force made acceptance of the Court's compulsory jurisdiction an issue of strategic significance. Despite our deep reluctance to do so, and the many domestic constraints that apply, our nation must

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retain the option to use force in our self-defense and in the defense of our friends and allies. We are a law-abiding nation, and when we submit ourselves to adjudication of a subject we regard ourselves as obliged to abide by the result. For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense, therefore, is effectively to surrender to that body the power to pass upon our efforts to guarantee the safety and security of this nation, and of its allies.

This development was of particular concern to us for reasons bearing directly upon the capacity of the ICJ to reach sound, correct decisions on use-of-force issues, and to enforce the principles it eventually develop on our Communist adversaries. The Court has no expertise in finding facts about ongoing hostilities or any other activities occurring in areas such as Central America. As a former trial judge, with considerable experience in complicated cases, I doubt that the 16 judges sitting on the Nicaragua case could reliably resolve the evidentiary problems presented. The ICJ is in essence an appellate court, more at home with abstract legal questions than with competing factual claims. Moreover, the Court's rejection of the Salvadoran intervention deprived it of that nation's indispensible contribution to a true picture of the situation in Central America, a contribution which goes to the heart of our legal position.

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Even if the Court were inclined to allow participation by all necessary parties, it has no power to compel that participation. We have, for example, no doubt that Cuba,, and quite probably the Soviet Union, have helped Nicaragua in the latter's efforts to subvert the democratic regime in El Salvador, as well as in its unlawful acts against Costa Rica and Honduras. But neither Cuba nor the Soviet Union can be expected to join in the proceedings, in view of their consistent refusal to submit to the Court's jurisdiction in any other matter, and the Court cannot force them to do so. This renders even more questionable the capacity of the Court to determine the facts concerning Nicaragua's aggressive acts.

The Court's lack of jurisdiction over Soviet bloc nations, especially the Soviet Union, also has long-term significance for the strategic acceptability of ICJ review of self-defense issues. The Soviets have long advanced the view, through the Brezhnev Doctrine and otherwise, and through their actions in places like Czechoslovakia and Afghanistan, that force is acceptable in order to keep a nation in the socialist orbit or to promote a socialist revolution, but have not hesitated to condemn responsive uses of force as violative of the UN Charter. We reject this view. We believe that, when a nation asserts a right to use force illegally, and acts on that assertion, other affected nations have reciprocal rights to the extent necessary to offset and counter such illegal

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activities. We cannot rely on the ICJ properly and fairly to decide such questions. To the extent that the Court were to make decisions that limited our ability to confront Soviet expansionism, we would be bound by those principles even though the Soviets could and would do as they pleased. The fact that most of the Court's judges come from nations which do not submit to its jurisdiction, including from Soviet bloc nations and other States that routinely support that bloc, is of special concern on these fundamental issues.

Mr. Chairman, in considering this complex and important issue, I would hope that you and the other Members of this distinguished subcommittee weigh carefully the national security implications of acceptance of the Court as a forum for resolving use-of-force questions. For example, would the Court be the proper forum for resolving disputes that gave rise to such actions as the Berlin airlift, the Cuban missile crisis, and most recently our diversion of the Achille Lauro terrorists? Each event involved questions of international law. At the same time, however, at stake on each occasion were interests of a fundamentally political nature, going to our nation's security. Such matters cannot be left for resolution by judicial means, let alone by a court such as the ICJ; rather, they are the ultimate responsibilities assigned by our Constitution to the President and the Congress. We did not consider such issues to be subject to review by the ICJ at the

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time we accepted the Court's compulsory jurisdiction, and we do not consider them to be encompassed by that acceptance now. The Court's apparent willingness to construe our declaration otherwise left us with no prudent alternative but to terminate that aspect of our use of its facilities.

We carefully considered modifying our 1946 declaration as an alternative to its termination. But we concluded that modification would not meet our concerns. No limiting language that we could draft would prevent the Court from asserting jurisdiction if it wanted to take a particular case, as the Court's treatment of our multilateral treaty reservation in the Nicaragua case demonstrates. Furthermore, the mere fact of having a declaration on file would be enough for the Court to issue an indication of provisional measures against the United States, whether or not the Court later found that it had jurisdiction under the declaration. Finally, the 1946 declaration expressly provides only for its termination, and we would not wish to have the legality or effectiveness of any lesser step open to question.

Looked at from the standpoint of the reality of compulsory jurisdiction today, the decision to terminate our 1946 acceptance was therefore a regrettable but necessary measure taken in order to safeguard United States interests. It does not signify a lessening of our traditionally strong support for

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the Court in the exercise of its proper functions, much less a diminution of our commitment to the rule of international law. We remain prepared to use the Court for the resolution of international disputes whenever possible and appropriate.

We recognize, Mr. Chairman, that this nation has a special obligation to support the ICJ and all other institutions that advance the rule of law in a world full of terror and disorder. Our belief in this obligation is what led us to set an example by accepting the Court's compulsory jurisdiction in 1946, and by continuing that acceptance long after it became clear that the world would not follow suit and that our acceptance failed to advance our interests in any tangible manner. Yet, the President is also responsible to the American people and to the Congress to avoid potential threats to our national security. The ICJ's decisions in the Nicaragua case created real and important additional considerations that made the continued acceptance of compulsory jurisdiction unacceptable despite its symbolic significance. We hope that this action will, in the long run, serve to strengthen the Court in the performance of its proper role in the international system established by the United Nations Charter and the Court's own Statute.

Thank you, Mr. Chairman. I would be pleased to respond to any questions that you or the other Members of the Subcommittee may have.

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Mr. YATRON. Thank you for your statement.

Judge Sofaer, the U.N. charter in article 94, paragraph 1, states each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. What is the difference between our obligations under article 94 of the U.N. Charter and the 1946 Truman declaration, as well as the Connally amendment?

Mr. SOFAER. Well, article 94 would only apply in a case to which we had been a valid party, which could only be a case begun within 6 months from when the termination was filed. We could not be made a party in cases unless we had previously agreed to allow ourselves to be a party.

Mr. YATRON. Since the administration's latest action renders the declaration of 1946 null and void, what obligations does the United States now have with respect to the World Court?

Mr. SOFAER. We have about 60 treaties or other agreements with other nations which designate the ICJ as the dispute resolver. So we are obliged under all those treaties to go to the ICJ with those nations if we have a dispute, and in addition to that, we have special agreements. We may make agreements with foreign States to submit disputes involving U.S. companies, such as the Ratheon matter to the ICJ. So we have extensive obligations to appear and argue and abide by the Court's rulings in those sorts of cases.

We are not attempting to lessen those obligations. Congressman Leach raised a very interesting and important question when he asked what the difference is between our submission to the Court's jurisdiction on the compulsory side and on the voluntary side? He said, we still have to go to the same judges, we still have to go to the same Court. That is not entirely true.

First of all, we will be able to go to chambers of the Court in many of the disputes where we go to the Court by agreement. We will be able to, with the other party, recommend that the court choose from among the judges of the Court a panel that both sides find agreeable.

In addition to that, the Court has not as yet done anything that would indicate to us that it would not be fair and objective in areas that don't touch upon national security. We have reserved in many of the agreements that we have on file, the treaties, et cetera, the power to make decisions in our national security which would not be subject to review in the Court.

Now, the Court has not passed on the meaning of those provisions. If the Court says, for example, that our national security clause in our friendship and commerce treaty with Nicaragua, does not give us the unilateral authority to say that we have taken actions that were necessary for our national security—if the Court reaches another conclusion on that—we may have to reconsider our submission to the Court under many of the treaties in which we have now agreed to submit disputes to the Court.

I can't predict what the Court is going to do on those issues. I would hope that it will revert to its traditional cautious role as a dispute resolver and not attempt to play the role of security council in the world.

Mr. YATRON. In the April 1984 modification, the United States announced it would not accept the Court's authority for 2 years in

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disputes involving Central America. Now, in view of this modification, why is it necessary to terminate our jurisdiction at this time instead of waiting the 2 years as specified?

Mr. SOFAER. That is a good question, Mr. Chairman.

The termination at this time, October 7, enabled us to give 6 months' notice and thereby make our termination effective when the 2-year period that we specified runs out.

Mr. YATRON. Mr. Solomon.

Mr. SOLOMON. I will pass for the moment and reserve and come back.

Mr. YATRON. Mr. Crockett.

Mr. CROCKETT. Thank you, Mr. Chairman.

I must apologize for being delayed. This prevented me from hearing the entire presentation made by the legal adviser. I would first call attention, Mr. Chairman, to the fact that we have a rule that requires that these written presentations be given to members of the committee in time for us to examine them and formulate some opinions or some questions. It is regrettable that this was not done in this case.

My own views with respect to this question are, I think, very succinctly summarized by the witness' predecessor, the former legal adviser I think of the State Department, Mr. Robert Owens, who was reported in Monday's October 7 issue of the New York Times, in the following comment: "For example, Robert Owens, a former State Department adviser said at the time that the decision, that is, the decision to withdraw from the World Court with respect to Nicaraguan dispute, gave the impression that we will stick with the Court if we think we are going to win, but, if not," Mr. Owens added, at a meeting of the American Society for International Law, "we will pick up our marbles and go home."

Do you wish to comment on that?

Mr. SOFAER. Well, I think that you should ask Mr. Owens what he meant, Congressman Crockett.

Mr. CROCKETT. I think it is pretty clear what he meant. It reminds me of baseball games when I was a youngster, the wealthy family on the block could afford to buy a bat or a glove for their youngster, and he felt that because of that he should dominate the game, that he should have whatever position he wanted, and that if you didn't agree with him, he took his bat or his glove and went home.

Mr. SOFAER. It doesn't remind me of that at all.

Mr. CROCKETT. I get the impression that is what we are doing here.

Mr. SOFAER. Not at all. We have abided by the decisions of the Court. There is no suggestion that just because the Court makes a decision we don't agree with, we are not going to abide by it. We think the Court is wrong, but we have not said we would not abide by the Court's decision even in the *Nicaragua* case. We will wait and see what the Court does.

What we have said is we think the Court has established principles as to its jurisdiction over use of force that make it undesirable for us to continue to permit those controversies to be brought to the Court.

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Mr. CROCKETT. I visited the Court about a year ago as a member of a subcommittee of our Judiciary Committee, and I had the good fortune to talk with, and we were briefed, by Judge Schwebel, who is the one American judge on that Court. I think it is significant that Judge Schwebel disagrees with this administration's point of view as far as jurisdiction in the *Nicaragua* case is concerned.

I think it is also significant that this administration, in its appearances before committees of Congress, has conceded that we were responsible for mining the harbors in Nicaragua. And isn't that the central issue that is before the World Court?

Mr. SOFAER. Not at all.

Mr. CROCKETT. What is the central issue?

Mr. SOFAER. The central issue on the merits was whether—assuming that we did take actions in support of the Contras—whether those actions were based on collective self defense, a response to Nicaragua's aggression. That is the issue as we see it.

Mr. CROCKETT. We are not at war with Nicaragua.

Mr. SOFAER. We certainly don't have to be at war with a nation to be subjected to aggression by it or to have our allies subjected to aggression by it.

Mr. CROCKETT. I should think if we are not at war with Nicaragua, then under no circumstances is there any justification for mining the harbors of Nicaragua.

Mr. SOFAER. No, I don't think that is true under international legal principles. In fact, this Congress, this House, the Senate, have repeatedly found that Nicaragua is responsible for aggression against its neighbors. It is not something that we have made up in the executive branch.

Congressman Boland introduced an amendment that was overwhelmingly adopted by the Congress saying that Nicaragua is guilty of aggression. Under the U.N. Charter when a nation is guilty of aggression, other nations can engage in necessary and proportionate individual and collective self defense against that aggression. It is a simple principle, fundamental. Most of the criticisms of our——

Mr. CROCKETT. The other nation in this case would be the legitimate Government of Nicaragua, and it certainly has not requested other nations——

Mr. SOFAER. The nation that was attacked by Nicaragua repeatedly is a democratic nation that is our ally, El Salvador, and the Court rejected its petition to intervene in this very case. No, most of the objections that I have heard, Congressman, to our withdrawing from the case don't have to do with the absence of merit in our position. For example, I haven't heard of an American reporter—and they tend to be pretty objective and not owned by anybody—that came back from Central America and said Nicaragua was not engaged in aggression against its neighbors.

Most of the criticisms are by people who say we should have stayed in the Court because we could have beaten Nicaragua in the Court. We had the stronger case on merits. Our position on that is we, as a matter of principle, have withdrawn. We agree we could have beaten Nicaragua in an impartial Court, but as a matter of principle, we do not believe issues of this kind belong in the ICJ.

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Mr. CROCKETT. As I understand the new policy that the administration is enunciating now, you are only withdrawing with respect to "political cases." Is that right?

Mr. SOFAER. No; we have withdrawn from the compulsory jurisdiction of the Court. States cannot now sue us in the ICJ without our specific consent. And we join every member of the Security Council in having reached that decision except the United Kingdom. And I would point out the United Kingdom's submission permits its modification or termination with immediate effect. For example, if they heard that someone was about to bring a case against them, they could simply exclude that case from their declaration. So, in effect, we join every member of the Security Council in reaching this conclusion.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. YATRON. Thank you, Mr. Crockett.

Mr. Leach.

Mr. LEACH. This subcommittee has certainly been blessed by two judges in discourse here. I appreciate the comments of the judge from Michigan.

Let me ask you, Judge Sofaer, you have a wonderful reputation in New York and you laid before this subcommittee a very refined brief for your client, the U.S. Government. Can you tell the subcommittee whether you agree with your brief?

Mr. SOFAER. I certainly agree with it, Congressman.

Mr. LEACH. Can you tell the subcommittee, were there dissenting voices within the Legal Adviser's Office of the State Department?

Mr. SOFAER. No dissent by me. I am the legal adviser——

Mr. LEACH. By people within your office? Was it unanimous?

Mr. SOFAER. In a big office with a lot of intelligent and wonderful people, all of whom, including the legal adviser, are concerned about the rule of law, and about international organizations, there are a lot of views stated. Just the painful way in which we reached this decision—the length of time it took, the steps that really drove us to it—show, I think, that your feelings about our having gone through a difficult time in reaching this point are correct.

I don't think any American lawyer would reach this conclusion lightly and pleasurably.

Mr. LEACH. Were there any resignations over the decision?

Mr. SOFAER. There was no reservation once it was made——

Mr. LEACH. Resignation.

Mr. SOFAER. No, absolutely not.

Because of our difficulty with it, it became a clear decision, very clear when it was finally made. Both the Attorney General and the Secretary of State supported it overwhelmingly, and I know that personally. It was supported at every level in the administration. No one enjoyed it. Everyone supported it.

Mr. LEACH. I can understand that.

We are for the next 6 months still bound by our declaration accepting the compulsory jurisdiction of the Court. If the Court were to rule against the United States, would we, during this next 6-month period, abide by the decision of the Court?

Mr. SOFAER. We would have to look at what the Court ordered us to do. I think I couldn't have been more clear about our general attitude toward law. We are not the kid on the block who walks

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home with his marbles or his baseball bat or his mitt or whatever he came to the game with. We have always abided by Court decisions, including decisions by the ICJ. They may do something that is so out of the ordinary that we would just have to appraise at the time it happens.

Mr. LEACH. But you are not suggesting that if the Court were to suggest the U.S. Government should cease and desist from further assistance to groups attempting to overthrow the Government of Nicaragua we would necessary comply?

Mr. SOFAER. We would not necessarily comply. We would not necessarily be permitted to comply without your consent—for example, if the Court ordered the United States to pay monetary damages. It has always been true that, when Congress passes a statute telling the executive to do something, as a matter of domestic law, that statute overrides any international obligation we may have. And in that context, we might then be violating some international order.

Mr. LEACH. As I understand the Constitution, treaties supersede statutes, so that is not precisely the case. In this particular case, we have a series of instances where the administration acted without congressional sanction, particularly in relation to the Boland amendment. But let me go on——

Mr. SOFAER. I think this is not that situation. Where you have an international obligation under a treaty, for example, followed by an inconsistent law adopted by Congress, that law would govern the conduct of the President. I don't think you would want it any other way.

Mr. LEACH. International Court decisions are, of course, somewhat sparse, but they do become part of a body of international law. Thus, if there is a decision on the *Nicaraguan* case, it becomes important in and of itself and also important for the precedent it might set. Have we not by our actions lost an opportunity to influence the outcome of this decision?

Mr. SOFAER. I certainly think we could have had a greater influence on the outcome of the decision if we had stayed in, but it is possible that the Court will take an interest in the facts *sua sponte*, so to speak. The report that the State Department put out about 6 weeks ago—a copy of which I would be happy to supply you if you haven't got one, Congressman—would, I think, make a very clear case to an objective judge that there has been aggression by Nicaragua and that whatever measures the United States may have adopted in support of El Salvador were justified under international law.

If the Court reaches that conclusion, I think it would be a happy ending to this chapter.

Mr. SOLOMON. Will you yield?

Mr. LEACH. I would be happy if we could have a second round.

Mr. YATRON. Why don't you go ahead and ask one more question.

Mr. LEACH. Would it, perhaps, meet with the chair's and the judge's approval if I were to submit several questions in writing to the legal adviser?

Mr. YATRON. I am sure other members will have questions to submit.

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Mr. SOFAER. I would appreciate an ongoing dialog with you on this subject.

Mr. YATRON. Thank you.

Mr. Solomon.

Mr. SOLOMON. I know we have two other witnesses who have been waiting a long time. I have a whip meeting to go to dealing with the deficit, which is a really important matter before this Congress. So we want to get on with this while we can.

One question on Congressman Leach's avenue of thought: You know, Senator Goldwater and I brought a suit against President Carter a number of years ago when President Carter chose to revoke our treaty with Taiwan. The Courts ruled against Senator Goldwater and myself saying that President Carter had that right. And I would assume under this current situation that, although Congress has passed a law, the President would have every right not to follow through and abide by the decision of the International Court.

I want to commend Mr. Sofaer for one of the clearest testimonies that I have ever received. Not being a lawyer, being a layman, it was very helpful to me, and I appreciate it very much. Thank you very much.

Mr. LEACH. I would like to echo that fact.

Mr. YATRON. I would like to ask you just two questions, if you can respond to them briefly. If not, maybe you can respond in writing later.

Mr. SOFAER. Sure.

Mr. YATRON. Suppose the Congress were, within the next 6 months, to enact legislation directing the President to withdraw from the October 7 notice of termination of acceptance of compulsory jurisdiction of the International Court of Justice. Would that be constitutional in your estimation? Why or why not?

Mr. SOFAER. I would rather respond to it carefully in writing, Mr. Chairman, so I won't take up time here.

[The subsequently submitted information follows:]

We do not believe the Congress, whether by statute or otherwise, has the power under the Constitution to compel the President to withdraw the October 7 notice terminating the 1946 declaration accepting the Court's compulsory jurisdiction.

Whether the United States undertakes an international obligation, or not, is a decision central to the conduct of foreign affairs. As such, the Constitution authorizes the President, in the exercise of his powers and responsibilities under Article II, to determine whether the United States should undertake such obligations, whether in the form of a treaty or international agreement, or an acceptance of the Court's compulsory jurisdiction. Under certain circumstances, e.g., the making of treaties or the acceptance of compulsory jurisdiction, the President may assume an international obligation on behalf of the United States only with prior approval, either by the Senate alone or both Houses of Congress, as the case may be. The President nevertheless retains under the Constitution the authority to decide to act, or not to act. Thus, the President is not bound to ratify a treaty containing obligations he deems incompatible with the national interest, even though the Senate may have given its advice and consent to such a treaty. Similarly, nothing in the Constitution would require the President to deposit a declaration accepting the Court's compulsory jurisdiction even though that declaration had previously been approved by the Senate or both Houses.

The President's authority to terminate international obligations is similarly well-established. Historically, United States practice in terminating treaty obligations, while varied, has included action taken by the President alone. As is well known, a challenge to the President's power unilaterally to terminate a treaty obligation of the United States was dismissed by the Supreme Court in *Goldwater* v. *Carter* in

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1979. While a declaration accepting the Court's compulsory jurisdiction is not a treaty, the constitutional issues involved are analogous. The same conclusion should be reached where the Congress seeks to direct the President to withdraw or otherwise negate a prior act terminating an international obligation of the United States, especially where, as here, that act is consistent with the international law and with the express terms under which, with the approval of the Senate, that obligation was undertaken.

Mr. YATRON. All right.

And the final question, Judge: The administration's press statement accompanying the October 7 announcement indicated that some Senators and Congressmen were contacted prior to this decision being made. Who did the Department of State contact? Did it contact members of the Senate Foreign Relations Committee? Did this consultation take place prior to a decision or did the Department inform Senators that the decision was made?

Mr. SOFAER. Well, with respect to the general issue, we did have communications with Congressmen who raised this question with us individually or in groups or at conferences. Some of the Congressmen were in conferences or made speeches, and we had dialog——

Mr. YATRON. You actually did speak to some members?

Mr. SOFAER. Yes, certainly, not in the halls of Congress, because no committee ever had hearings on what the President has been doing.

On the day before the decision was announced publicly, we, out of a matter of courtesy, called several Congressmen, or at least attempted to. There were some whom we called who were not available at the time and whose staff was not available at the time. We tried to call all the relevant chairmen and the leaders, and, in fact, I came up to the Hill and made myself available to anyone who wanted to discuss the matter. I spent an hour with Senator Moynihan, who was very concerned about the issue.

Mr. YATRON. Thank you very much, Judge Sofaer, for being here and giving us the benefit of your views.

Our final two witnesses will testify as a panel. They are the Honorable Leonard Meeker, former legal adviser of the Department of State; and Mr. Burt Pines, vice president of the Heritage Foundation.

Again, gentlemen, we welcome you here. Unfortunately, because of time constraints, we would appreciate if you could keep your oral statements to 5 minutes or less. Your entire statements will be printed in the record. This way we will have a little more time for the question and answer period. And as I said, your entire statement will be printed in the record. Mr. Meeker, you may begin, sir.

STATEMENT OF LEONARD C. MEEKER, FORMER LEGAL ADVISER, DEPARTMENT OF STATE

Mr. MEEKER. Thank you, Mr. Chairman. I appreciate the invitation to appear before this subcommittee and to present a statement on the subject of the World Court.

I would like to emphasize really a few points rather than to read my statement, which I assume will be in the record.

Mr. YATRON. Without objection.

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Mr. MEEKER. First of all, I think that the United States is a Government founded on law. We have always felt that the actions of the Government should be subject to judicial scrutiny, they have been, and to the great advantage of the people of this country in its history.

Similarly, we believe—I believe—along with many other lawyers in the United States—that the actions of the U.S. Government in international affairs should be likewise not immune from scrutiny by the public, by the press, by Congress, and indeed by international organizations having competency over this subject matter.

I think it is a step contrary to the national interests of the United States to terminate our acceptance of compulsory jurisdiction. We have, ourselves, in the United States many more instances of cases where we would like to sue another country in the World Court than other countries are motivated to sue us.

Now, that is in part because our own system affords a highly developed system of judicial remedies within the Nation. And our experience has been before the World Court that it has been to the advantage of the United States to be able to invoke its jurisdiction.

Now, it has been urged that the United States should not submit to an International Court a case that raises questions about the use of armed force or cases involving large political issues. The argument is that national defense and national sovereignty are just too important to allow cases involving them to be decided by a Court.

This is an old argument, and it would deny the possibility of progress toward a more lawful and peaceful world. And the argument is not supported by the charter or by the statute of the International Court. The charter of the United Nations confers upon the Security Council, in article 24, primary responsibility for the maintenance of international peace and security, not exclusive responsibility but primary responsibility, and the World Court is given in its statute, jurisdiction to decide cases involving the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of reparation to be made for the breach of an international obligation.

Now, that jurisdiction does not exclude important cases, cases involving the use of armed force, cases involving national defense. If such a case is brought, it is for the Court to decide what the law is after first determining its jurisdiction.

Now, in the *Nicaragua* case, there were three issues decided so far. One was whether the Court had jurisdiction under the United States acceptance of compulsory jurisdiction, and the Court answered that it did. The next question was whether a bilateral treaty of 1956 gave the Court jurisdiction in this case. And, again, the Court answered that it did have jurisdiction. And I should note that on neither of those issues was the Court unanimous. There were dissents on both. Then by a unanimous vote, the Court decided the third issue, and that third issue was: Is this case justiciable or non-justiciable? Is it something the Court can properly deal with, or is it not? By unanimous decision, the Court decided the case was justiciable and that the Court should proceed with the case.

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Now, the assertion has been made here that because of Nicaragua's aggression against El Salvador, it should be perfectly clear that the United States has the right of collective self-defense against Nicaragua. I would just like to emphasize that two concepts I think have been confused in that assertion.

Let's look at the Charter article which deals with collective self-defense. That is article 51. And it says:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.

Now, aggression and armed attack are not the same. They are two different conceptions. Armed attack is when a state uses its armed forces against the territory or armed forces of another state. Aggression can occur when there is intervention in the affairs of another country, as by to a guerrilla movement which is trying to overthrow a government.

There is a great deal of evidence to show that is exactly what Nicaragua has been doing in the case of El Salvador, it has been engaging in aggression against El Salvador. But it has not engaged in armed attack. No armed forces of Nicaragua have invaded El Salvador.

I would like to make that distinction clear because the right of a country to respond to armed attack is different from and greater than the right to respond to aggression. Aggression is a matter which should be referred under the Charter to the Security Council under chapter 7, which has the responsibility for dealing with acts of aggression, threats to the peace, breaches of international peace.

Now, also this morning the assertion has been made that El Salvador has been refused the right of intervention in the Nicaragua case, and here I think it should be pointed out that the Court decided only that in deciding the issues of jurisdiction between the United States and Nicaragua, El Salvador's participation was not appropriate. The Court did not decide that El Salvador could not come into the case on the merits. In fact, the chances are that indeed the Court would agree to the intervention of El Salvador on the merits.

I think that the United States would have been well advised to continue with the case brought by Nicaragua for the very purpose of defending our actions in Central America, for the purpose of bringing El Salvador into the case so that it could present its counterclaims against Nicaragua, and so that there could be obtained from the Court an authoritative decision on the international law of armed intervention and aggression—what the rights of parties are in such a situation. We might well find that the decision of the Court would be very important from our own point of view in other situations where the shoe might be on the other foot.

Now, I would raise here one question in relation to the Nicaragua case. There the Court founded its jurisdiction not simply on the United States acceptance of compulsory jurisdiction but also on the 1956 treaty with Nicaragua. As Judge Sofaer has pointed out, there are many treaties which provide for the settlement of disputes by the World Court. What now will happen in this case and in those other cases; the Court has found that it has jurisdiction

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under the 1956 treaty, as well as under our acceptance of compulsory jurisdiction. Will the United States accept the Court's decision on the merits? Does it accept the decision on jurisdiction given by the Court both under the 1956 treaty and under the acceptance of compulsory jurisdiction, while that acceptance remains in force?

It is obvious that progress in the spread of world law is slow and uneven. The United States over its history has been on the side of law, on the side of world law, as well as on the side of law in this country. It has followed that tradition and given a strong example to the rest of the world.

The recent action in withdrawing from the Court is a retrograde step, which is I think much to be regretted, and I would hope that the Congress will now express itself very clearly to the effect that the Court is a valuable institution, that our participation in it is important from the point of view of the national interest, and that the United States ought to rejoin the Court fully at the earliest possible time.

Thank you, Mr. Chairman.

Mr. YATRON. Thank you very much, Mr. Meeker, for an excellent statement.

[The prepared statement of Leonard C. Meeker follows:]

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Prepared Statement of Leonard C. Meeker, Former Legal Adviser, Department of State

At the end of the Nineteenth Century, as the United States was becoming a world power, it exercised leadership to propose an international court for deciding cases between nations. Through an evolutionary process extending over the next half century the International Court of Justice at The Hague was established 40 years ago this month. The United States became a party to the Statute of the Court and accepted its compulsory jurisdiction.

Then in October 1985 the present U. S. Administration reversed the course of its predecessors -- both Republican and Democratic -- and cancelled this country's acceptance. Thus has a significant retrograde step in national policy been taken without either Congressional consultation or public debate.

The United States was founded to have a government of law, amenable to the decisions of an independent judiciary which should protect the rights of citizens and preserve an ordered society under law. Our Constitution has been the model for many others around the world framed since 1787. Ingrained in our tradition is the idea that the actions of American Executive and Legislative authorities shall be subject to judicial scrutiny. In keeping with that tradition the United States accepted that its actions in international affairs, when they involve legal disputes, should be subject to the scrutiny of the International Court of Justice. Our acceptance of the Court's jurisdiction was vis-a-vis those countries undertaking the same obligation.

About one third of the Members of the United Nations have accepted the

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World Court's jurisdiction. It is, of course, disappointing that more have not done so. But evolution comes slowly. The process is aided by strong positive leadership. It is surely a negative factor that the United States, which once led the way, has now taken a major step backward, away from international adjudication and away from the rule of law in the world.

It is a step that is also contrary to the national interest of the United States. That interest has to be appraised in the context of a substantial period of history -- not in ephemeral relation to a particular Administration's displeasure at the outcome in a single phase of one case. The world being what it is, the United States will want to submit international legal disputes to an international tribunal in many more instances than other countries will be motivated to sue the United States in a World Court: our highly developped legal system affords excellent national remedies.

It has been urged that the United States should not submit to an international court cases raising questions about the use of armed force, or involving important political issues. The argument runs that national defense and national sovereignty are too important to allow cases involving such issues to be decided by a court. This is an old argument, which denies the possibility of progress toward a more lawful world and instead prefers to rest national policy in international affairs on the right of the strongest. The argument is not supported by either the Charter of the United Nations or the Statute of the International Court of Justice. The Charter confers on the Security Council "primary", not exclusive, responsibility for the maintenance of international peace and security. Nowhere in the Court's Statute is an exclusion provided for cases involving national defense or other important political issues. Article 36, paragraph 2, of the Statute -- which provides for compulsory jurisdiction--covers "all legal

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disputes concerning:

"a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation."

Proponents of the archaic and essentially despairing view that important cases must not go to the Court disregard the great value to the United Statesof being able to go to court and get a judgment such as the one we obtained in the Iran Hostages case.

The United States is an open society. The actions of government are subject to searching examination by the courts, the Congress, the press, and the public. This is a wholesome state of affairs. We should equally consider it prudent and healthy for our government's international actions to be subject to scrutiny by an international tribunal when there is a dispute of international law about them. We will want U. S. actions to pass muster in that forum too.

Some critics of the International Court of Justice assert that it has become politicized, that it does not judge according to law. Anyone interested need only read the Court's judgments to see that they consist of carefully reasoned legal opinions -- sometimes reasoned at wearying length; but that is only a sign that the Court could dispatch more business, like the United States Supreme Court in its earliest years when afforded the luxury of each justice writing a lengthy opinion in a case.

In the Nicaragua case, cited by the Administration as the basis for its recent actions toward the World Court, there were three issues in the first phase: (1) was compulsory jurisdiction applicable between Nicaragua and the United States? (2) did the bilateral treaty of 1956 confer jurisdiction on the Court? (3) was

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the case non-justiciable because it raised questions regarding an armed conflict? By 11 judges to 5 the Court decided that Nicaragua had reciprocally accepted compulsory jurisdiction and that the United States last-minute attempt to withdraw its acceptance of jurisdiction in this case was not effective. By 14 judges to 2 the Court decided that the treaty conferred jurisdiction. By 16 judges to 0 the Court decided that the case was justiciable. People may differ with one or another or all of these conclusions on the jurisdiction of the Court, but they should recognize that the conclusions reflect and represent the work of a court, not the pronouncements of a political body.

Instead of boycotting the Court after the first phase of the Nicaragua case, the United States would have done well to press its substantive claims against Nicaragua. In addition, El Salvador could have come into the case on the merits to counterclaim against Nicaragua for intervening in the Salvadoran civil war. The United States would have presented its case against Nicaragua in justification of U. S. actions there as lawful assistance to the beleaguered Government of El Salvador. The Court would be enabled to declare some important international law on issues of armed intervention, after receiving a full presentation by both sides in the litigation. What would be decided in this case would be applicable to other situations, where the shoe might be on the other foot. An outcome in the Nicaragua case which might seem less than wholly satisfactory to the United States could be useful and valuable to this country in another fact situation. But by quitting the Court and failing to argue our case on the merits an important opportunity is lost.

But the issue today is not the Nicaragua case. It is a far broader question: whether and when the United States will get back on the track of history that promises a better and more peaceful future through the wider prevalence of law. This committee, and the whole Congress, can give an impetus toward resumed U. S. leadership in the long campaign for a more lawful and better world by urging that the United States rejoin the International Court of Justice at the earliest possible time.

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STATEMENT OF BURTON YALE PINES, VICE PRESIDENT, HERITAGE FOUNDATION

Mr. YATRON. Now, our final witness for today is Mr. Pines. Mr. Pines, you may go ahead, sir.

Mr. PINES. Thank you very much, sir.

My name is Burton Pines. I am vice president of the Heritage Foundation, and its director of research.

Let me note that I have a statement which I will submit for the record and merely summarize here.

The Heritage Foundation U.N. assessment project in the last 3½ years has published 63 separate studies on the United Nations and international organizations. It is for this reason that I feel particularly privileged today to meet with you and your panel. We are addressing the issue today, as we this morning have heard over and over again, because the United States has decided that the World Court will not have compulsory, automatic jurisdiction over the United States when cases are brought before the Court. This I think is a wise, sensible decision and long overdue. It is a decision compelled by the record of the World Court, and it is to the Court's record which we must look right now.

The World Court is 39 years old. It is too old to be regarded simply as an untested ideal worth pursuing. It is too old to be regarded, at 39, simply as an infant organization worth nurturing, it is too old to be seen as simply a good intention. At 39 years old, the World Court, like the United Nations, is the world's oldest international body—with the exception of the Holy Roman Empire.

At 39, therefore, it is time to judge the World Court on its record and its record is clear. It tells us that the World Court is ineffective, irrelevant and nearly universally ignored. Why do I say the World Court is ineffective and irrelevant? I say it because the World Court does almost nothing. From 1945 through 1981, only 42 contentious cases and only 17 advisory opinions came before the World Court. From 1976 to 1981, only one new case was brought before the World Court. Since its founding, the World Court has rendered judgments on the average of only twice a year, and this number is decreasing. For good reason.

The 15 judges of the World Court have been widely known as the least worked, best paid jurists in the world. Among the issues the World Court has been called upon to decide is whether the World Health Organization had the right to move a regional office out of Alexandria, Egypt. On such weighty matters does the World Court sit.

Why do I say that they are almost universally ignored? Because the Court is ignored. As the chairman pointed out in his opening remarks, very few nations in the world give the World Court compulsory, automatic jurisdiction. West Germany has rejected the Court's jurisdiction. So has Iceland, China, India, and France. The Soviet Union has never accepted the World Court's jurisdiction nor have any Soviet Union satellite states. To the contrary, the Soviet Union and its satellites have imposed a kind of automatic rejection of the World Court, never accepting its jurisdiction. Of the United Nations' 159 members, only 45 grant the World Court automatic ju-

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risdiction, Lichtenstein does also, as does Switzerland, but they aren't United Nations members.

By the action, therefore, taken by the Reagan administration, by the action taken by the United States, we will be not in a minority. We will have the very rare pleasure of being in the vast majority of United Nations members.

I think the best thing that the World Court has had going for it has been its formal name: The International Court of Justice. This name, to me at least, invokes an image of magisterial solemnity, a bench of internationally trusted Solomons resolving the thorny issues that divide nations.

Now, this image violates, Mr. Chairman, every norm of truth in labeling, every norm of truth in advertising ever devised by this Congress. The truth is that the World Court is as politicized as any other organization of the United Nations, as politicized as any other body of the United Nations. I think it is wise and about time that the United States asks: Do we want ourselves judged automatically, compulsorily, by the Court's members from Algeria, the Soviet Union, Poland, Nigeria, and Senegal? Do we really expect an impartial judgment from them on any political matter? I don't think so, Mr. Chairman.

We are not completely surprised that the Court has failed to fulfill the idealistic expectations of its founders. Indeed, the U.S. Senate, in its wisdom in ratifying our membership in 1946, made provisions just for this. The Connally amendment, about which we have heard a great deal specifically, clearly, unambiguously reserves for the United States the right to determine the Court's jurisdiction over us. We have given the World Court the chance. We have given the World Court more chance than have most nations of the world. We have given the Court 39 years. Our patience and indulgence are praiseworthy, though we are seldom praised for them.

But we are entitled, after 39 years, to render a judgment on the Court, to admit that it is an umpire who does not call the plays fairly; it is a referee who is blind to the action in the ring.

I would urge, Mr. Chairman, that we say enough is enough. We are not idiots. We are not patsies. We are right to say: the World Court is ineffective, irrelevant, and biased. It does not deserve to have compulsory automatic jurisdiction over the United States, and I commend the Reagan administration for taking the action it has.

Thank you very much.

[The prepared statement of Burton Yale Pines follows:]

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PREPARED STATEMENT OF BURTON YALE PINES, VICE PRESIDENT, THE HERITAGE FOUNDATION

SHOULD THE U.S. ACKNOWLEDGE THE JURISDICTION OF THE WORLD COURT?

When we attempt to evaluate the World Court, we confront the dilemma of idealistic image versus sober reality. This is clear from the Court's formal name--the International Court of Justice. This evokes images of magisterial solemnity--a bench of internationally trusted Solomons resolving the thorny disputes that divide nations. Yet the Court's gritty reality differs vastly from its lofty image. For good reason, therefore, has the Reagan Administration decided to deny the tribunal automatic jurisdiction over United States actions regarding Nicaragua and other political matters. This decision ought to be reassuring to those Americans determined to base foreign policy on reality and concerned with preserving their nation's sovereignty.

To start with, no one denies Washington's right to tell the Court to keep its nose out of America's business. The Court's own by-laws unambiguously specify that the Court has jurisdiction only when parties to a dispute grant it such jurisdiction. A defendant state cannot be brought before the international tribunal nor can a default judgment be given against the state unless it has so consented.

Indeed, the world's nations typically have told the Court to butt out. West Germany, Italy, Ireland, China, India, Iceland, France, the Soviet Union, all Soviet-bloc nations and scores of other countries have rejected the Court's jurisdiction. Some examples:

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In 1973, Pakistan tried to take India to the Court for refusing to repatriate Pakistani prisoners captured during the war over East Pakistan's secession; India refused to participate in the proceedings.

That same year, Paris insisted that the Court lacked competence when Australia and New Zealand tried to take France to the Court on charges that its nuclear testing in the South Pacific violated international laws.

Nearly two decades earlier, Moscow ridiculed the notion of appearing before the Court when the U.S. tried on several occasions to press charges that the Soviet Union, in various aircraft incidents, had violated the law. Similarly, Moscow to this date ignores the 1962 Court ruling that the USSR must pay its assessed share of United Nations' costs for the Congo operation. The fact is that neither the Soviet Union nor any of its East Bloc satellites ever have accepted the Court's jurisdiction.

Of the United Nations' 159 members, only 45 have granted the Court automatic jurisdiction. (Such jurisdiction is granted by Switzerland and Lichtenstein, which are not U.N. members.) The U.S., therefore, is hardly alone--indeed, not even in a minority--by the action of the Reagan Administration.

It is no wonder that the Court's fifteen judges are probably the world's most underworked jurists. Between the Court's founding

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in 1945 and 1981, it handled a meager 42 contentious cases and gave advisory opinions on an additional 17 cases. And from 1966 to 1981, the Court was given only six new cases and handed down only five advisory opinions. Just one case was filed between 1976 and 1981. On average, since its founding, the Court has rendered fewer than two judgments per year--a number which has been decreasing.

Those few cases which the Court does hear almost all concern rather tame matters and only rarely deal with even minor differences between nations. The bulk of the Court's calendar has been filled by disputes concerning fishing rights, delimitation of continental shelves, minor boundary disputes and such burning questions as whether the World Health Organization had the right to move its regional office out of Alexandria, Egypt.

In short, the World Court, despite its pretensions and grand quarters at The Hague, is a hollow and rather useless institution to which hardly any nation ever turns for settling hardly any dispute. It is a relic of an earlier age whose internationalism and simplistic idealism are now discredited. For this reason alone, the Reagan Administration is wise to deny the Court jurisdiction.

It is wise also because the Court resembles no tribunal familiar to the Anglo-Saxon tradition of jurisprudence. The Court is as highly politicized and as biased as the U.N. General

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Assembly. Indeed the Court's 15 judges are elected by the General Assembly and Security Council. Sitting on the bench are such impartial champions of international justice as Algeria, the Soviet Union, Poland, Senegal and Nigeria. We would be naive to expect justice from such a group.

There is a more compelling reason for the Administration's action. The World Court now, as at its inception, threatens the very concept of sovereignty upon which the nation-state rests. By what right or for what good reason should a body of international jurists don robes, judge the action of the U.S. and render a decision binding the U.S.? Such a fundamental transfer of sovereignty has been resisted since the American Republic's earliest days--from George Washington's injunction against foreign alliances to the Senate's repudiation of League of Nations membership. Even the NATO treaty, the most solemn declaration of international commitment ever made by the U.S., falls short of automatically binding the U.S. to any action. If America's European allies are attacked, for instance, the U.S. does not automatically find itself at war but merely is obliged to regard that attack as an attack on the U.S.

When the Senate in 1946 ratified U.S. membership in the World Court, it pointedly insisted that an integral part of the ratification was the statement, called the Connally Amendment (named after its sponsor, Thomas Connally of Texas), that the U.S. reserved the right to determine the Court's jurisdiction as

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it affected the U.S. The U.S. Senate thus anticipated wisely the situation in which the U.S. in recent years has found itself at the World Court.

The Reagan Administration's refusal to grant jurisdiction to the World Court is a reaffirmation of America's two-century old vigorous defense of its sovereignty. It is this reaffirmation of sovereignty and independence from international bodies--at a time when the United Nations, UNESCO and almost every other international organization has been turned into an anti-American and anti-West lynch mob--which deserves the support of Congress and the American people.

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Mr. YATRON. Thank you very much, Mr. Pines, for your statement.

Mr. Meeker, you indicate in your testimony the need for the United States to assume leadership in the long campaign for a more lawful and better world by rejoining the International Court of Justice. Do you mean by this statement that we have already left the Court? Should we proclaim a declaration in which we reaccept the jurisdiction of the Court?

Mr. MEEKER. Yes, I do mean just that. I think the United States ought to accept the compulsory jurisdiction of the Court under article 36, paragraph 2 of the statute, and that we should do so without the Connally amendment. No one should be the judge in his own case. The statute of the Court makes it perfectly clear that domestic questions are excluded from the Court's jurisdiction, and that would be quite sufficient as an exclusionary provision, and it should not be provided that the United States alone should make the determination as to what is a domestic question.

Mr. YATRON. To your knowledge, are the judges selected by the General Assembly judicially competent?

Mr. MEEKER. Indeed, they are. During my years in the State Department, I had occasion to bring some cases before the International Court of Justice, and indeed to appear there before those judges. There are 15 of them, they are all jurists of outstanding background in their own countries, and some of them indeed in international affairs. The Brazilian judge is a leading Brazilian jurist who has also had a very large role in the diplomatic service of his country, the Italian judge has been a member of the International Law Commission. You can go through the whole list and find that this is not by any means a collection of political hacks, which has been suggested just now.

It is a Court made up of outstanding individuals, and I think that another aspect of this which should always be kept in mind is the content of the Court's decisions. A person needs only to read those decisions to see that they are very carefully reasoned judicial opinions. They are not political documents. The operations of the Court are totally different from the operations of, say, the General Assembly or some of the specialized agencies of the United Nations. It is a real court made up of real judges.

Mr. YATRON. Thank you, Mr. Meeker.

Mr. Pines, in your statement you stress sovereignty and independence from international bodies. You further state that the United Nations, UNESCO, and almost every other international organization is anti-American and anti-West. What do you propose that we do to respond to this prevailing mood, withdraw from every international organization until they see our point of view? Are you advocating isolationism with regard to international law and international organizations?

Mr. PINES. To the contrary, I am advocating strong interventionism. The action we have taken with UNESCO has had salutary effects. We see the decision taken by Singapore, the decision about to be taken by the United Kingdom, the statement by the Netherlands and other countries criticizing UNESCO. It is our bold action in UNESCO which may lead to our returning to UNESCO.

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What we have done in terms of international organizations, with the help of your committee and the help of the Senate Foreign Affairs Committee in the past 4 years, is to say that at last we are taking these organizations seriously, we are no longer going to see these as merely playpens where countries can let off steam. This approach of the Reagan administration was unheard of in the State Department in the 1970's. But now we have said that we are taking these U.N. organizations seriously. We will make serious criticisms. If there are structural deficiencies which refuse to be changed, we will withdraw and use that kind of leverage until those deficiencies are changed.

I think that a case could be made that the action we are taking in the World Court only involves certain cases. And I think here that Mr. Meeker is absolutely wrong. We are not withdrawing from the World Court, we are only withdrawing compulsory jurisdiction. We are going to be involved in the World Court. We can say we no longer give compulsory jurisdiction, and that itself may prod the World Court to become a more serious organization. We have taken the same kind of action with the World Health Organization, again, I know, with the cooperation of a number of members of your committee. The World Health Organization [WHO] was an organization headed down the track that UNESCO was headed 5 years ago. But WHO has been turned around, and today the World Health Organization is once again a responsible organization.

I think rather than seeing our action as isolationism or withdrawal, it is strong interventionism by the United States in these international organizations which will save the international organizations for the rule of law which all of us today have praised.

Mr. YATRON. You mention in your testimony there are judges from Algeria, the Soviet Union, Poland, Senegal, and Nigeria in the World Court. You fail to acknowledge the other 10 justices, many of whom are from friendly countries, and also one from the United States. Am I to infer from your testimony that any judge from a country that is unfriendly to the United States is incapable of making an unbiased decision?

Mr. PINES. No, you shouldn't infer that, at least if we were speaking of an ideal world. Unfortunately, or regrettably, we have 39 years of history behind us. We know that as competent as they are, Mr. Chairman, and as competent as Mr. Meeker told us they are, that the representatives from certain countries have a record of following the political line of those countries.

Now, we here in the United States, and I think in the United Kingdom, have a marvelous ideal of the international civil servant. Regrettably almost no other country in the world shares this ideal of the international servant. When someone from Senegal joins the Court, they remain a Senegalese; when someone from the Soviet Union joins the Court, they continue carrying out Soviet justice. American and British justices do not. The record has shown that justices from these countries, as competent as they are, will probably be carrying out political directions from their capitals.

Mr. YATRON. I want to ask one final question, if you can answer me briefly. In your view, Mr. Pines, what is the importance of the rule of law in U.S. foreign policy?

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Mr. PINES. We are a part of a grand Anglo-Saxon tradition. I studied law under Karl Lewellyn who impressed upon me a healthy respect for the rule of law. It is the only way that civilized nations can, in fact, resolve disputes. The trouble is, Mr. Chairman, the world is populated by a lot of uncivilized nations.

Mr. YATRON. Thank you.

Judge, did you wish to ask any more questions?

Mr. CROCKETT. I was only staying long enough to compliment Mr. Meeker on his presentation. It was completely devoid of the cant and the playing to the public that characterized some of the other statements that have been made to this subcommittee.

Mr. YATRON. Thank you, Judge. Mr. Siljander.

Mr. SILJANDER. I thought both statements were well developed. I appreciate the time, but I have an 11:30 appointment.

Mr. YATRON. Sure. Thank you very much for being here. I am sure their answers will be helpful to the subcommittee.

Mr. Leach.

Mr. LEACH. Let me just ask Mr. Pines a question. I disagree obviously from my former statement with the burden of what you said. On one point I do agree, and that is, it is a tragedy the World Court has not been better used or more widely used. But there is a logical problem maybe you can help me with. Your argument is that the Court is weak because it hasn't been well used. What is the great danger? Why is the court such a dangerous thing if the problem is lack of use and not more use?

Mr. PINES. In the formal testimony I submitted, I discussed the issue of sovereignty, which I won't get into now. You have that. I don't think the Court is a great danger, I think the Court is a little danger. This is not the most pressing issue facing the United States or the international community. I think, as you indicated in one of your questions, it has created a record. This little danger can be rectified, and I think that the action taken by the Reagan administration could rectify or prevent this little danger.

Mr. LEACH. To go further, I think many of us assume that in the Court, several states may have members that might be constrained by something beyond legal concerns. Obviously from America's perspective, we are concerned perhaps about a Soviet representative, for instance. However, I am struck that it might have been a bit gratuitous to include references to Senegal and Nigeria. Do you have evidence of judges from Nigeria and Senegal operating in a callous, political way in the decisions that they have rendered as members of the International Court?

Mr. PINES. I didn't use the term "callous and political." I said I would be hesitant to expect them to render an unbiased decision, because the actions of so-called international civil servants from Nigeria and Senegal in other international organizations have given us every reason to believe there is no such thing as an international civil servant from Nigeria or Senegal.

Mr. LEACH. I don't see any evidence to that effect in terms of the World Court. The judge, as you know, from Nigeria has been trained, among other things, at the University of London——

Mr. PINES. So has Karl Marx.

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Mr. LEACH. He lived in London. I don't believe he was trained at the University of London. The University of London, at least part of it, is a more recent entity.

But to go further, I am struck by the potential of mentioning two African countries as bordering on the prospect of racist. I know of no evidence and no instance in which judges from either of these countries have ever operated on any basis except their obligations to the World Court. Now if you have evidence to the contrary, I would be appreciative if you would supply it to the subcommittee. And, if you do not, I would suggest an apology is in order.

Mr. PINES. Let me repeat what I just said, that it was my own opinion, and given the record of so-called international civil servants from these countries, in other organizations of the United Nations, there is no reason to expect unbiased judgments from them.

And I think the record is very clear on this. And we can provide all kinds of evidence from those who have served in the United Nations of what has happened with the international civil servant. Mr. Arkady Shevchenko was mentioned earlier. We have volumes full of how citizens from most countries of the world regard employment at the United Nations. The citizens of the United States and United Kingdom are rare, rare exceptions.

Mr. LEACH. I would hope you would realize that under consideration today is the International Court of Justice, not UNESCO, not the World Health Organization. In any regard, I must say that few institutions in American history have played a more decisive role in American policy towards the United Nations than the organization that you represent. Can you give this subcommittee, which has jurisdiction over the United Nations, any hint of where your new targets of opportunity are going to be in terms of directing American policy in novel directions?

Mr. PINES. I would be happy to supply all 63 papers. We have a number of working groups at the Heritage Foundation to which staff members from this committee are invited on a regular basis. Those from the Library of Congress also are invited on a regular basis. Everything we do is on the public record. We make no secret of what we do at the Heritage Foundation regarding these matters.

Mr. LEACH. Thank you, Mr. Chairman.

Mr. YATRON. Thank you, Mr. Leach. I would like to thank both of you gentlemen, Mr. Meeker and Mr. Pines, for taking time out of your busy schedules to come here before our subcommittee and to give us the benefit of your views, which will be very helpful.

And, with that, the subcommittee stands adjourned, subject to the call of the chair. Thank you.

[The subcommittee adjourned, subject to the call of the Chair.]

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APPENDIX 1

TEXT OF HOUSE CONCURRENT RESOLUTION 208, DEPLORING THE INTENTION OF THE UNITED STATES TO WITHDRAW FROM THE COMPULSORY JURISDICTION OF THE WORLD COURT

99TH CONGRESS
1ST SESSION

H. CON. RES. 208

Deploring the intention of the United States to withdraw from the compulsory jurisdiction of the World Court.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 7, 1985

Mr. LEACH of Iowa (for himself, Mr. SEIBERLING, and Mr. MCHUGH) submitted the following concurrent resolution; which was referred to the Committee on Foreign Affairs

CONCURRENT RESOLUTION

Deploring the intention of the United States to withdraw from the compulsory jurisdiction of the World Court.

Whereas the United States sponsored and supported the establishment of the International Court of Justice, or World Court, on October 24, 1945, to provide for the orderly arbitration of disputes among nations under the rule of law;

Whereas the Senate gave its advice and consent to the acceptance of the compulsory jurisdiction of the International Court of Justice on August 2, 1946, in recognition of the importance of the rule of law to American interests and American values; and

Whereas the United States has utilized the International Court of Justice on numerous occasions to resolve its disputes with other nations: Now, therefore, be it

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Resolved by the House of Representatives (the Senate concurring), That the Congress—

(1) deplores the notification of the Secretary General of the United Nations by the President that the United States is withdrawing from the compulsory jurisdiction of the International Court of Justice;

(2) reaffirms its support for the international rule of law and the role of the International Court of Justice.

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APPENDIX 2

Responses to Questions Submitted by Representative Leach to the State Department

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1. The Heritage Foundation has testified that, "The Court is as highly politicized and as biased as the U.N. General Assembly." Does the Administration agree with that assessment? Was that one of the reasons for withdrawing from the compulsory jurisdiction of the ICJ?

The Court and the General Assembly are radically different from one another, both in their respective composition and functions. We prefer to address each on its own merits rather than to engage in comparisons between the two institutions. The Court's decisions to date in the Nicaragua case--whether or not motivated by "politicization" or "bias" or some other cause--are objective factors that had to be taken into account in determining whether the United States would remain in the case and, ultimately, whether the United States would continue to accept the Court's compulsory jurisdiction. That a majority of the Court's judges come from countries that do not accept compulsory jurisdiction, some of which routinely oppose United States policies on important international questions, was another factor for evaluation in connection with those Administration decisions.

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2. Article 94 of the United Nations Charter states that each member of the UN undertakes to comply with decisions of the ICJ in any case to which it is a party. Since the UN Charter is a treaty and has the status of U.S. law under Article VI of the Constitution, can it be assumed that the President will abide by the final decision of the ICJ in the present case before the Court to which we are a party?

   If the ICJ issues an order directed toward the U.S., based on its decision on the merits of the case, and if the U.S. should decide not to comply that that order, would that not in principle constitute a clear violation of Article 94 of the UN Charter? Should the U.S. decide not to comply with the Court's decision, would the President be in violation of his constitutional duty to take care that the laws (including treaty laws) be faithfully executed under Article II, section 3 of the U.S. Constitution in view of our obligations under Article 94 of the Charter?

We would prefer not to speculate as to what kind of decision, and against which party, the Court may reach on the merits of the Nicaragua case. Similarly, we would not wish to speculate as to what the United States may do in the event some form of judgment is given in favor of Nicaragua.

In general, that the obligations imposed by Article 94 of the Charter apply only in respect of Court decisions rendered within the scope of the Court's functions and competence under the Charter and Statute, and in cases where jurisdiction under either Article 36(1) or Article 36(2) of the Statute is properly found to exist. If either of those elements is lacking, a decision may, under well-established international legal principles, be regarded as excès de pouvoir and therefore without legal effect. An additional factor of particular relevance to the Nicaragua case is that Article 51 of the Charter provides that "[n]othing in the present Charter shall

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impair the inherent right of individual or collective self-defence. . . ." (Emphasis supplied.) Thus, Article 51 overrides Article 94 to the extent that a decision by the Court purports to limit, or has the effect of limiting, a State's inherent right of individual or collective self-defense. Absent binding enforcement action by the Security Council pursuant to Article 94(2)--creating an obligation independent from that under Article 94(1)--a State is not obliged to abide by a decision of the Court that exceeds its powers under the Charter or Statute. Moreover, as one of Nicaragua's attorneys recently observed, "the Court has no enforcement power".

With regard to the constitutional issue, it is necessary to take into account the distinction between self-executing and non-self-executing treaty obligations. The latter, of which an obligation under Article 94 would be one, require some further (generally congressional) action to give them effect as a matter of internal United States law. The President could not on his own authority comply with any Court decision that ordered the United States to pay monetary damages to the winning party; the authorization and appropriation of the necessary funds by the Congress would be required. These positions cannot be claimed to violate the President's obligation to execute the laws; it is the President's constitutional responsibility to conduct the foreign affairs of the United States, which includes particularly the responsibility to interpret treaties and other international obligations of the United States.

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3. The Administration has argued that the right of self-defense under Article 51 of the UN Charter to justify its policies in Central America. However, Article 51 states that, "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . . ." Since the Administration has refused to report to the Security Council under Article 51, can it legitimately apply the Article 51 "self-defense" rationale to its policies in Central America?

The reporting requirement of Article 51 has been satisfied. The Security Council has taken cognizance of the Central American situation and has acted, in Resolution 530 (1983), by endorsing the Contadora process as the appropriate dispute settlement mechanism. In this context, the United States has reported on Nicaraguan aggression and our collective response. Most recently the United States circulated to the Security Council and other UN organs a special report on the subject. Article 51 does not specify any particular reporting format, nor does it require that the operational details of actions taken in individual or collective self-defense be reported.

In any event, the reporting requirements of Article 51 of the Charter must be considered in the context of the substance and purpose of that Article as a whole. The drafters of Article 51 recognized that the right of individual or collective self-defense was an essential attribute of State sovereignty that pre-dated the Charter and that exists independently of it. Thus Article 51 does not create the right of self-defense. Rather, it acknowledges that that right is

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"inherent", and expressly disallows its impairment, except to the extent that the Security Council may take necessary measures to maintain international peace and security in the circumstances giving rise to its exercise. The function of the reporting requirement of Article 51 is to apprise the Security Council of situations involving the exercise of the right of individual or collective self-defense in order that the Council might consider action to restore peace and security. That reporting requirement thus cannot properly be read as a limitation on, or precondition to, the exercise of the inherent right of self-defense.

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4. The nation with the presumed claim to "self-defense" against Nicaragua is El Salvador. Yet it is not the activities of El Salvador which are in question in the present proceedings before the ICJ. For the U.S. to act in the place of El Salvador in the exercise of any right to self-defense, if such an act of becoming an "alter ego" in itself is consistent with international law and the exercise of natural sovereign rights, it would probably have to be at the specific and formalized request of the Government of El Salvador, and the U.S. could not undertake to exercise that right to any greater degree than El Salvador could. Has the El Salvadoran Government ever specifically requested that the U.S. Government undertake actions against the Nicaraguan Government pursuant to its right of self-defense--specifically, the mining of the harbors and the arming and training of a force bent on overthrowing the Government of Nicaragua? If so, when and how was such a request conveyed? Is it the position of the U.S. Government that we are responding to our right of self-defense or that of El Salvador? It it is our self-defense, is our response proportional to their aggression?

El Salvador has clearly sought and received U.S. assistance in its efforts to blunt the ongoing Nicaraguan aggression against that country. Indeed, it was precisely this fact that in part motivated the Government of El Salvador to seek to intervene in the Nicaragua case, as reflected in El Salvador's Declaration of Intervention filed with the Court on August 15, 1984:

> Faced with this [Nicaraguan] aggression, we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States Congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world.

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> Any case against the United States based on the aid provided by that nation at El Salvador's express request, in order to exercise the legitimate act of self-defence, cannot be carried out without involving some adjudication, acknowledgment, or attribution of the rights which any nation has under Article 51 of the United Nations Charter to act collectively in legitimate defence. This makes inadmissible jurisdictional action by the Court in the absence of the participation of Central America and specifically El Salvador, in whose absence the Court lacks jurisdiction.

More generally, it is well established in the law of the Charter that a State is entitled, in the exercise of the inherent right of individual and collective self-defense recognized in Article 51, to come to the assistance of another State or States against whom a third State is directing the unlawful use of force. The Charter's prohibitions on such unlawful uses of force define an obligation erga omnes, in the observance of which all States, even those not directly the victim of the unlawful acts, have an interest that the right of self-defense serves to protect. Thus, international law does not require a "specific and formalized request" of the State seeking such assistance before that assistance may lawfully be provided. The vital right of States to defend themselves and others is not subject to procedural formalities. With regard to the specific case of El Salvador, the United States has taken a variety of measures to aid it in resisting unlawful Nicaraguan acts aimed at the subversion and eventual overthrow of its lawful and democratically chosen government. These

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include diplomatic efforts, security and economic assistance to the Government of El Salvador, economic sanctions against Nicaragua, and certain support to the armed resistance to the Sandinista regime. As President Duarte advised in connection with President Reagan's April 1985 Peace Plan, which inter alia involved legislative action to permit support to the anti-Sandinista forces:

> Your initiative and approach have my complete support. . . . We remain concerned . . . by the continuing flow of supplies and munitions from Nicaragua to guerrilla forces here in El Salvador. . . . [W]e deeply appreciate any efforts which your government can take to build a broad barrier to such activities--efforts which a small country like El Salvador cannot take in its own behalf.

It would be mistaken to evaluate the necessity and proportionality of measures taken in the exercise of the inherent right of self-defense in terms of specific acts, as opposed to the overall level and nature of the measures in question. United States actions taken in respect of self-defense against the unlawful use of force by Nicaragua are necessary and proportionate to the nature and level of Nicaragua's own actions in the context of the prevailing political and security conditions in Central America.

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5. If the United States has the right to undertake actions to destabilize the Government of Nicaragua, does Nicaragua or its allies have the right to undertake proportionate actions against the United States?

As the President has made clear on several occasions, the United States is not seeking the overthrow of the Government of Nicaragua. What we are seeking is the cessation of Nicaraguan aggression against its neighbors in the context of arrangements that will ensure an enduring peace in the region. Nor has the United States asserted some general "right" to destabilize governments. On the contrary, as the Congress formally declared in section 722(c)(2)(C)(vi) of the International Security and Development Cooperation Act of 1985 (Public Law 99-83), it is Nicaragua that

> . . . has committed and refuses to cease aggression in the form of armed intervention against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention . . . .

United States actions in respect of Nicaragua are necessary and proportionate measures taken in the exercise of the inherent right of individual and collective self-defense under Article 51 of the Charter. The lawfulness of those actions derives from their nature as appropriate responses to Nicaragua's unlawful use of force against the territorial integrity and political independence of its neighbors. In the hypothetical presented, Nicaraguan actions directed against the United States would have no such legal justification, and Nicaragua would have no right to undertake them.

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6. Does our right of collective self-defense justify U.S. Government efforts to overthrow the Government of Nicaragua? By analogy, does the right of collective self-defense justify U.S. Government efforts to overthrow the Governments of Cuba and the Soviet Union since the U.S. also charges those governments with aiding and abetting Nicaraguan aggression against El Salvador?

As indicated in the answer to the previous question, the United States is not seeking to overthrow the Government of Nicaragua. To the extent that the United States is furnishing support to the democratic resistance to the Sandinista regime, it has served to reduce the capacity of that regime to carry out its unlawful use of force against its neighbors in Central America. Such support is proportional to Nicaragua's unlawful acts, and is necessary to encourage the Sandinista regime to cease and desist from those acts, and to bolster the capacity of its neighbors to resist them, as indicated by the formal findings by the Congress in the context of authorizing assistance to the democratic resistance. Such support is a legitimate exercise of the inherent right of individual and collective self-defense. Whether particular actions are consistent with international law or useful as a practical matter cannot be determined in the abstract, but only in the context of a specific situation. What is necessary, proportional, and useful in one set of circumstances may not be in another.

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7. In asserting the right of self-defense under Article 51 of the UN Charter, is the Department asserting that an "armed attack" has occurred against El Salvador or the United States? Does not international law distinguish between "armed attack" and other forms of aggression, and does it not also distinguish between remedies permitted under those two circumstances?

The right of self-defense recognized in Article 51 of the Charter extends beyond responses to conventional military assaults by the regular armed forces of a State. Nothing in Article 51 or elsewhere in the Charter precludes a State from engaging in necessary and proportionate measures in response to unconventional uses of force directed against it or its allies. (In this regard, it is instructive that the equally authentic French text of Article 51 employs the more clearly generic term, "aggression armée".) Under contemporary conditions of world order, the tendency of States engaged in the unlawful use of force is to pursue their goals by means other than the use of their regular armed forces. To limit the right of self-defense to situations of conventional military attack would be to deprive victim States of the means lawfully to counter the unlawful actions of aggressors. International law has not developed in such a destabilizing fashion.

Nicaragua, in its pleadings before the Court, has itself characterized alleged United States actions against it as an "armed attack". As pointed out in our recent special report "'Revolution Beyond Our Borders': Sandinista Intervention in Central America", the U.S. and stated Nicaraguan views as to the applicable international law are virtually identical. Both

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agree that support to armed groups constitutes a use of force that is indistinguishable from the use of regular military forces. The lawfulness of such use of force turns on whether it constitutes aggression or a response in individual or collective self-defense. Thus the question turns on the facts. Nicaragua's claim that it has provided no support to guerrilla groups in neighboring countries is simply belied by the facts, as the Congress has found.

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8. If the United States believes its actions against Nicaragua are sanctioned under Article 51 of the UN Charter and other principles of international law, why has the Administration refused to argue its case before the World Court? While the ICJ refused to allow El Salvador to participate in the proceedings before the Court on the question of jurisdiction, could not the U.S., by staying to argue its case, have provided an opportunity for El Salvador to join in the proceedings?

The United States did not withdraw from further participation in the Nicaragua case because it lacked confidence in its legal and factual case on the merits. We withdrew from the case because the nature of the issues before the Court is such that the Court cannot, consistent with the Charter and its own Statute, adjudicate them without infringing the dispute settlement function assigned by the Charter exclusively to political mechanisms, in particular the Security Council. We could have prevailed in the Court only at the cost of a precedent that would be unacceptable, both from the standpoint of the law of the Charter and our own national interests. We participated in the case only for the purpose of seeking to persuade the Court of these important questions of principle; once the Court had decided otherwise we could not, consistent with those principles, have remained in the case. Furthermore, to proceed on the merits in the Court would have further diverted attention from the only agreed dispute settlement mechanism--the Contadora process--and thereby delayed its progress.

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Insofar as El Salvador is concerned, whether to seek to intervene in the case was, and remains, a question for determination by that Government. El Salvador sought to intervene at the jurisdiction and admissibility phase of the case to argue that the case did not belong before the Court, and that the Court did not have jurisdiction. El Salvador, as a participant in the Contadora process which is designed in part to resolve both its and Nicaragua's security concerns through negotiations, did not wish to see that process undercut by the separate adjudication of issues of particular concern to Nicaragua. Thus the interests that El Salvador sought unsuccessfully to protect by its intervention at the earlier phase of the case would not necessarily be served by intervention on the merits. One may also rasonably speculate that the Court's rejection, without a hearing, of the Salvadoran intervention, even though made as of right under Article 63 of the Statute--a process that the then President of the Court had previously described as "automatic"--may well have dimmed Salvadoran confidence in the Court's objectivity in handling this case.

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9. Since the ICJ will eventually render a judgment in the present Nicaragua case which may be precedent-setting in terms of future cases which may impact on U.S. foreign policy and national security interests, how are United States vital interests protected by refusing to participate in this case? Has not the U.S. lost an important opportunity to influence the outcome of such a potentially important case to ensure it is as compatible with our long-term national interests as possible?

The Administration engaged in a thorough analysis of the various courses of action open to us in the wake of the Court's November 1984 decision on the question of its jurisdiction and the admissibility of the Nicaraguan claims. Given the strength of our legal case on the merits, the possibility of influencing the Court's eventual decision was a relevant factor that had to be taken seriously into account, and was. We had, however, to weigh against that possibility the fact that the Court is without competence under the Charter to engage in the adjudication of Nicaragua's claims of ongoing U.S. aggression, and our own claims of Nicaraguan aggression and collective self-defense in response. Proceeding on the merits would have undercut this fundamental Charter principle. Thus, the potential benefits to be gained from participation on the merits would have been purchased at the cost of weakening a larger principle, with implications for the Charter, the Court, and our longer-term security interests. As a consequence, we reached the conclusion that our interests would be better served by not participating beyond the jurisdiction and admissibility phase.

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10. The Department has asserted that matters involving national security questions do not belong before the ICJ and that such matters more properly belong before the Security Council or other political fora. Yet, the UN Charter (Article 24) does not state that the Security Council has exclusive jurisdiction over such questions and Article 33 of the Charter specifically states that the parties to a dispute which threatens international peace and security shall first seek solution by a variety of means including arbitration or judicial settlement. On what basis does the Department argue that the ICJ has no role in the present dispute between the U.S. and Nicaragua?

The UN Charter deliberately distinguishes between disputes the continuation of which may threaten the maintenance of international peace and security, and actual "threats to the peace, breaches of the peace, and acts of aggression". The former are governed by Chapter VI, which confides them to a wide range of settlement mechanisms, including judicial settlement where appropriate. The latter are confided by Chapter VII solely to the Security Council.

Whether or not a given case brought before the Court is admissible--that is, whether the Court has the competence to adjudicate it--is determined, in the first instance, from the face of the pleadings of the party instituting suit. Nicaragua's pleadings alleged, among other things, the existence of an ongoing armed attack by the United States against the territorial integrity and political independence of Nicaragua, and specifically admitted that Nicaragua had made identical claims before the Security Council "as threats or breaches of the peace, and acts of aggression" under Chapter VII of the Charter. Moreover, Nicaragua's pleadings directly

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implicated third States in the alleged unlawful acts of the United States, and prayed for the termination of further U.S. assistance to those countries.

Thus, by its own pleadings, Nicaragua put before the Court a situation that the Charter exclusively confides to the Security Council, since only the Security Council has the power under the Charter to evaluate Chapter VII claims, including claims to the exercise of the inherent right of individual or collective self-defense under Article 51. For the Court to assert the power to adjudicate such claims would stand the Charter system for the maintenance of international peace and security on its head. The United States argued these points to the Court in great detail and length; the Court's November 1984 decision finding Nicaragua's claims to be admissible simply ignores those arguments and the Nicaraguan pleadings. Indeed, despite the clear Nicaraguan pleadings, the Court asserted that the case did not involve claims of an ongoing armed conflict. By thus pretending that the case did not involve the sort of claims that the Charter assigns to resolution by exclusively political mechanisms, the Court was able to find that it had the authority to be seized of it. It remains to be seen how the Court will deal with the dilemma it has thus created.

The Court also ignored Nicaragua's pleadings, the United States multilateral treaty reservation to its acceptance of compulsory jurisdiction, and its own past jurisprudence, in

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finding that the third States (principally El Salvador, Honduras and Costa Rica) implicated in Nicaragua's allegations against the United States were not indispensable to the adjudication of the merits of those allegations.

Article 24 of the Charter does provide that the Security Council has the "primary" responsibility for the maintenance of international peace and security. But in this respect Article 24 merely reflects the responsibilities in this regard vested expressly in the General Assembly under Articles 10 and 11 of the Charter (responsibilities which do not, however, extend to Chapter VII claims), and the general responsibility of all States to settle differences peacefully. Nowhere in the Charter or the Statute is any textual reference made to some responsibility for the Court in this area.

Insofar as Article 33 is concerned, that Article addresses only disputes or situations falling within Chapter VI of the Charter, and not to Chapter VII claims such as Nicaragua has made. In any event, the United States has engaged in extensive diplomatic efforts aimed at dissuading Nicaragua from pursuing its unlawful use of force against its neighbors; those efforts are outlined in the Department's special report "'Revolution Beyond Our Borders': Sandinista Intervention in Central America". The United States has also vigorously supported the Contadora process, the agreed mechanism for seeking the resolution of the interrelated political, security, economic

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and other concerns of the region, and that has been endorsed as such by the Security Council. Nicaragua, on the other hand, has thus far shown itself to be immune to diplomatic efforts, and has undercut the Contadora process by seeking to take isolated regional issues of concern to it to the Court and other fora.

Finally, our position reflects the assumptions and understandings upon which we became party to the United Nations Charter. The framers of the Charter, among whom the United States was a guiding force, deliberately designed the security system of the United Nations so as to place responsibility for dealing with ongoing use-of-force and self-defense questions in the Security Council. That responsibility, and the special position of the Permanent Members of the Security Council in its exercise, were essential to the acceptance of the Charter by the United States and its wartime allies. No one conceived at the time that the Court's compulsory jurisdiction could permit that painstakingly designed Charter structure to be circumvented. Were it otherwise, it is most unlikely that the President would have submitted the Charter to the Senate, or that the Senate would have given its advice and consent to ratification.

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11. The Administration's testimony raises strong concerns about the fact that the present case, involving the "ongoing use of force", establishes a precedent for the ICJ, the Court not having accepted such cases in the past. Is the United States engaged in the "ongoing use of force" against Nicaragua at the present time? Under what congressional sanction are such actions being taken? If there is no ongoing use of force by the United States, does this case become any different from other which involved past acts of use of force? What philosophical objections do we have to the ICJ becoming involved when there is an "ongoing use of force"?

As explained in the response to the previous question, the significant factor for the admissibility of the Nicaragua case in the Court is that Nicaragua has alleged the existence of an "unlawful use of force" against it by the United States. Whether or not Nicaragua is able to establish those allegations on the merits--and we believe that, looked at objectively, they are baseless--the fact that the Court has shown itself ready to adjudicate on the basis of such allegations is deeply disturbing, as is the Court's evident willingness to adjudicate countervailing United States claims to be engaged in the exercise of the inherent right of self-defense.

The United States in fact has been engaged in the provision of security and other assistance to neighboring countries in order to help them respond to Nicaragua's unlawful acts. As a corollary to this effort, the United States has also provided certain support to the armed resistance to the Sandinista regime. These actions are consistent with the international law governing the exercise of the right of individual and collective self-defense, and the assistance

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involved has been authorized by various Acts of Congress, each of which has contained findings that such assistance was warranted in light of Nicaragua's unlawful use of force against its neighbors. Indeed, an adverse decision by the Court on this issue would implicitly reject the validity of these congressional determinations.

Our objection to the adjudication by the Court of the Nicaraguan claims is not philosophical, but grounded in our analysis of the proper function of the Court as a judicial body and the role of judicial settlement in the system of the Charter. Furthermore, the Court is inherently unsuited to reach the kind of complex factual determinations that adjudication of the Nicaraguan claims must necessarily involve. Although the Court's Statute does in theory provide for a certain fact-finding capacity, that capacity is largely untested in practice and, in any event, was never intended for use in such exceptionally fluid and dangerous circumstances as those Nicaragua has alleged to exist. It is particularly difficult to see how the Court could "find the facts" concerning Nicaraguan aggression against its neighbors, and the support given Nicaragua by Cuba and other States, when those third States are not before the Court. More generally, the framers of the Charter implicitly recognized that judicial determinations of legal "wrong" or "right" could well impede, rather than facilitate, the kind of political give-and-take that an effective settlement of such situations necessarily requires.

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12. Specifically, what options were open to the United States other than complete withdrawal from the compulsory jurisdiction of the Court? For example, wouldn't removal of the six-month notice provision have given the United States a way to avoid certain suits without relinquishing, in the eyes of the world, its overall respect for the Court?

In the months following the President's January decision that we would no longer participate in the Nicaragua case we engaged in a thorough examination of possible modifications to our 1946 declaration with a view to protecting us against further such suits in the future. While many of these--such as replacement of the six months' notice provision with language allowing immediate termination or modification of the declaration--would have been worth pursuing under ordinary circumstances, the Court's unprecedented approach to its Article 36(2) jurisdiction in the Nicaragua case made clear that we could not rely on any changes to the 1946 declaration to protect us in the future. Any new or revised reservation that we might attach to the 1946 declaration would be subject to interpretation by the Court, and it is not possible to draft limiting language that could not be overcome by a Court determined to find jurisdiction in a particular case.

The Court's handling of the existing multilateral treaty reservation to the 1946 declaration offers a dramatic example of this. That reservation excludes from the Court's jurisdiction disputes arising under a multilateral treaty unless all parties to the treaty that would be affected by the decision of the Court are also parties to the case. Despite

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Nicaragua's own pleadings implicating third States in th· alleged U.S. violations of the UN and OAS Charters, and praying for an order terminating U.S. assistance to those absent States, and despite communications received by the Court from those States (including in particular the Salvadoran Declaration of Intervention), a majority of the Court purportedly found itself unable to conclude at that stage of the proceedings that those States would be affected by its decision. In effect, the Court read that reservation right out of the 1946 declaration.

Finally, the importance to the United States of any acceptance of compulsory jurisdiction depends on more than its symbolic value. It also should be an effective legal tool for the United States to bring other States before the Court. The 1946 declaration is fatally flawed in this respect by the so-called Connally reservation, the self-judging character of which allows any State that we might try to sue to invoke it against us conclusively, on the ground of reciprocity. Repeated attempts in the past to secure Senate repeal of the Connally reservation have been unsuccessful, and we have no reason to suppose that this situation has changed.

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13. Will complete withdrawal from compulsory jurisdiction really stave off so-called "political" cases, while, in fact, since it now seems apparent that nations may obtain broader jurisdiction over the United States under Friendship, Commerce and Navigation treaties, such cases or even frivolous claims might be asserted in the future under such treaty jurisdiction?

We were indeed dismayed that the Court in the Nicaragua case provisionally accepted the Friendship, Commerce and Navigation Treaty with Nicaragua as a basis for jurisdiction over the United States in that case. No legal relationship exists between the substance of that treaty and the substance of the Nicaraguan claims before the Court. At the same time, the Court's decision made clear that that finding was of a provisional nature; whether the Court in fact had jurisdiction under the Treaty would depend on whether Nicaragua is able to persuade the Court on the merits that its claims against the United States properly arise under the substantive provisions of the treaty. We will be looking with particular care at the Court's decision on the merits to see whether Nicaragua's invocation of the Treaty sets a precedent for that sort of expansive jurisdictional pleading in the future.

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14. If compulsory jurisdiction is an "either-or" posture for the United States, what viable solutions can be posed for strengthening the International Court of Justice? And, since the Administration clearly feels that the ICJ, either as an institution or as presently constituted, suffers certain shortcomings, has it considered any proposals for reform and what are they?

The question of whether and how the Court could be made a more effective institution is a recurring one on the agenda of the United States, other States, and private and public organizations. Various proposals have been made, for example, to select judges only from States that accept compulsory jurisdiction, to expand the Court's advisory opinion jurisdiction, to allow parties other than States to participate in contentious cases, to limit the possibility of reservations to acceptances of compulsory jurisdiction, to develop and seek widespread adherence to some "model" Article 36(2) declaration, and the like. Most proposals on the subject could be implemented only through amendment of the Statute of the Court. The Statute could not easily be opened for amendment without simultaneously opening the Charter for amendment, and we have long considered that it would not be in the interests of the United States to open either instrument for revision. More generally, the international community as a whole has not demonstrated the collective political will that would be necessary for serious reform.

Perhaps the most effective reform would be the realization of the original goal of the framers of the Statute--adherence to the Court's compulsory jurisdiction, on similar terms, by

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most if not all States. This would give each State a stake in the Court and in the development and application of international law by the Court. But as the past 40 years have demonstrated, the great majority of States have not been prepared to undertake this commitment. Decisions such as those that the Court has thus far made in the Nicaragua case tend to undermine the very confidence that the Court needs for it to establish itself as a major force in the international system.

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15. Given its interest in cost-benefit analysis in advance of any policy changes, did the Administration--the State Department, the National Security Council, or some other executive branch agency--attempt to gauge the impact of its recent action, withdrawing U.S. acceptance of the compulsory jurisdiction of the ICJ, on the almost forty-year long effort by the U.S. to obtain universal recognition of the ICJ as a forum for resolving disputes through international law? If so, please explain what factors have been determined to justify the heavy costs to the rule of law and the peaceful settlement of disputes implied by the recent change in U.S. policy toward the ICJ?

We considered the possible adverse consequences of our decision to terminate the 1946 declaration, particularly on the symbolic value of the United States adherence to the Court's compulsory jurisdiction. That symbolism led the United States to maintain its declaration in force for nearly four decades, although that declaration brought no tangible benefit to the United States, while exposing the United States to suit.

But symbol must be distinguished from substance. Looked at on its merits, the 1946 declaration is not the basis on which the United States has established its commitment to the rule of law; nor is the fact that other States accept the Court's compulsory jurisdiction evidence that they abide by the rule of law.

United States respect for the rule of international law is well-established in the international community. Most other States are aware of the defects in the 1946 declaration, and of the fact that it has been of no use to us. Perhaps most important, a great majority of States do not accept the Court's compulsory jurisdiction. Some governments that have spoken to

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the issue regard the decision as regrettable, but also as an entirely understandable response to the excesses of the Nicaragua case. We hope that our decision will stimulate the Court and other States to consider seriously how the Court may be strengthened as an effective mechanism for the settlement of legal disputes.

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16. How would the Administration respond to Professor D'Amato's assertion that in the long run, because we are a law abiding nation on the whole, we have more to gain than lose from full-fledged court membership?

As noted in the response to the previous question, the perception that, in terminating its acceptance of compulsory jurisdiction, the United States may have marred its standing as a law-abiding nation is baseless. Our standing and moral leadership in the world is well-established, and cannot be shaken by how some other States may choose to characterize an unexceptionable, and entirely legal, act. Moreover, the 1946 declaration has never been of any practical value to the United States, yet has carried risks that the Nicaragua case made unacceptable. An analysis based on hypothetical circumstances in which the Court's compulsory jurisdiction may in theory be advantageous, does not take adequate account of both the inadequacies of the 1946 declaration as a positive legal tool for the United States and the fact that most States do not accept compulsory jurisdiction, and show no sign of ever doing so. We also believe that acquiescence in the use of our acceptance of compulsory jurisdiction to bring before the Court matters relating to our right to use force in individual and collective self-defense would necessarily and substantially harm our national interests.

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17. The fact that a majority of nations, including the Soviets and client states and some influential Western powers, do not subscribe to the compulsory jurisdiction of the ICJ is not a new circumstance. Consequently, what legal, political, or other changes have occurred which make this old fact of life a justification for a reversal of U.S. policy?

The fact that so few other States accept the Court's compulsory jurisdiction probably would not, in and of itself, have been sufficient reason for the United States to terminate its own acceptance of that jurisdiction. But it is an undeniably negative factor that has to be taken into account in any objective analysis of the place of compulsory jurisdiction in the world today, and of the benefits to the United States of its 1946 declaration. The United States decision to terminate its acceptance of compulsory jurisdiction was based on the aggregate of all such negative factors, including the Court's decisions to date in the Nicaragua case.

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18. By any standard, the question of U.S. adherence or not to the ICJ's compulsory jurisdiction involves something more than the day-to-day management of foreign affairs. Accordingly, should not Congress have been fully consulted in the matter? Is it reasonable to assume that Congress will be fully consulted if and when this Administration (or any future Administration) may decide to withdraw further from ICJ jurisdiction?

We fully appreciate the legitimate interest that the Congress has in this particular issue, as well as in the relationship of the United States and the Court generally. It is Administration policy to consult with the Congress concerning significant foreign policy actions whenever possible, even though no legal obligation to do so may exist. The Congress has been aware since January that the President had directed a re-examination of our continued adherence to the Court's compulsory jurisdiction under the 1946 declaration. Moreover, since the termination is not effective until next April, ample opportunity still exists to address the issue together with the Congress, as demonstrated by the October 30 hearings.

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APPENDIX 3

Prepared Statement of Burns H. Weston, Chair, Independent Commission on Respect for International Law, and Bessie Dutton Murray, Professor of Law, University of Iowa

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Statement on the United States Withdrawal
from the General Compulsory Jurisdiction of the
International Court of Justice

of the

INDEPENDENT COMMISSION ON RESPECT FOR INTERNATIONAL LAW

for the record of a hearing held before the

Subcommittee on Human Rights and International Organizations

of the

United States House of Representatives

on

October 30, 1985

Mr. Chairman, the Independent Commission on Respect for International Law (ICRIL), a newly organized private commission of international law specialists, is committed to enhancing respect for the world rule of law among both governments and the general public. Accordingly, the members of the Commission, whose names and affiliations are appended hereto, greatly appreciate the opportunity to present the following statement for the record of this hearing on the vital topic of adherence by governments, in particular the Government of the

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United States, to the compulsory jurisdiction of the International Court of Justice (I.C.J.), popularly known as the World Court. It is respect -- or lack of respect -- for international law, we believe, that in the end will determine the fate of the Earth. For nations to operate outside the rule of law in their international relations is, quite simply, to invite disaster in our nuclear age.

STATEMENT

We of the newly established Independent Commission on Respect for International Law wish to express our deepest professional and personal concern over President Reagan's decision to withdraw the United States from the general compulsory jurisdiction of the International Court of Justice. We share deeply the belief, written into the foundations of our Republic and proclaimed by every administration since our Republic's inception, that the good society is the society that is governed by the due process of law. We agree with the Founding Fathers that ours must be "a government of laws, not of men," and we believe that this viewpoint can benefit international society as a whole. As President Eisenhower said, already many years ago: "The world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law."

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President Reagan, we surmise, agrees with this overall viewpoint, given in particular his declaration before the United Nations General Assembly earlier this year that the United States seeks "to replace a world at war with one where the rule of law will prevail." Yet, on October 7, without prior public notice or debate, let alone approval, the Secretary of State, by executive notice on behalf of the United States Government, reversed a 39-year commitment of the United States -- made and endorsed by earlier administrations and the Congress -- to the general compulsory jurisdiction of the International Court of Justice. This action, we believe, raises some deeply troublesome questions about what the President and his administration have in mind when he talks about the rule of law in world affairs. Does he mean the rule of law based on reciprocal tolerance and mutual forbearance in relation to the rest of the international community? Or does he mean the rule of law imposed unilaterally by dint of American power? We hope, Mr. Chairman, the former.

Mr. Chairman, our principal objections to the Administration's withdrawal from the general compulsory jurisdiction of the World Court are three. First, we believe it is based on selective history about, and false perceptions of, the World Court. Second, we believe it is based on political assessments and motives that are far more likely to do harm than good to the United States over the long run, possibly even the short run. Finally, we believe that it is based on a conception of

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foreign policy decision-making that raises serious questions for our constitutional democracy. The consequence is to render the Administration's action illogical, unwise, and at least morally questionable. The withdrawal, we contend, was not consistent with our national interests.

1. Selective History and False Perception

The Honorable Abraham D. Sofaer, Legal Adviser to the Department of State, has presented arguments to this hearing in defense of the United States withdrawal from the World Court's compulsory jurisdiction. These arguments, we submit, are premised on shaky historical and perceptual foundations.

a. Claim that the I.C.J.'s Compulsory Jurisdiction Has Been An Historical Failure

Judge Sofaer first argues (at page 4 of his statement) that

> the hopes originally placed in the compulsory jurisdiction by the architects of the Court's Statute have never been realized, and will not be realized in the foreseeable future. The compulsory jurisdiction of the Court reflects a compromise struck by the framers of the UN Charter. Acceptance of compulsory jurisdiction was not made mandatory, but left to the option of States. We had hoped that widespread acceptance of compulsory jurisdiction, and its succesful employment in actual cases, would eventually lead to its universal acceptance. . . . Currently only 46 of the 161 States entitled to accept the Court's compulsory jurisdiction have done so. . . . What is more, many of the States that do accept compulsory jurisdiction have attached reservations to their acceptances so as to deprive them of much of their meaning.

In this account, however, the Legal Adviser omits several key facts clearly evident in the historical record. In addition to disregarding that most of the Court's judgments have won

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respect and compliance, he ignores that the majority of the drafters of the Court's Statute wanted compulsory jurisdiction to be mandatory, not optional. He ignores, too, that it was primarily the governments of the United States and the Soviet Union that resisted the idea of compulsory jurisdiction and that it was consequently these same governments that helped to force the compromise to which he refers. And he ignores that it was the United States, by its 1946 declaration of acceptance of the Court's compulsory jurisdiction, including the well known Connally Amendment, that set the model for other countries in making disabling reservations to that jurisdiction.

In other words, never having fully accepted the World Court's compulsory jurisdiction in the first place, it was to no small degree the United States itself, by virtue of its unchallenged supremacy in the world community immediately following World War II, that contributed significantly -- and, we believe, unwisely -- to the erosion of the World Court's compulsory jurisdiction. As eminent jurists and others have observed on repeated occasions, the reservations attached by the United States to its 1946 declaration of acceptance of the Court's compulsory jurisdiction substantially undercut the example the United States tried to set for other governments by its act of acceptance.

Thus the Administration's dubious logic is revealed: the compulsory jurisdiction of the International Court of Justice is a desirable goal; it has not, however, lived up to its

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potential; it has not lived up to its potential because some powerful governments, including the United States, have not thrown their full weight behind it; therefore, the United States, in the name of justice, should not put any weight behind it. It may be noted that it is a similar, if not identical, illogic that underwrote, at least in part, the United States withdrawal from continued participation in the case brought by Nicaragua against the United States and now pending ex parte before the World Court (pursuant to Article 53 of the I.C.J. Statute). The United States ostensibly supports acceptance of the Court's compulsory jurisdiction and therefore, logically, should have been eager to endorse Nicaragua's claim to such acceptance. But it was not thus eager and did not so endorse. Instead, despite the Court's finding of such acceptance by Nicaragua and notwithstanding that the Court's Statute (to which the United States is a party) requires any dispute about the Court's jurisdiction to be settled exclusively by the Court, the United States, claiming the Court's decision to be, according to Judge Sofaer (p. 4), "insupportable as a matter of law," chose to discontinue its participation in the case.

b. Claim that the I.C.J. Has No Role in International "Political" Conflicts

The Legal Adviser further argues before this Subcommittee (p. 9) that the World Court has no role in controversies involving use-of-force and self-defense issues, that such "political" issues are assigned by the U.N. Charter to the U.N.

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Security Council alone, and that, in the matter of Nicaragua, the Security Council has delegated the responsibility for peacemaking exclusively to the so-called Contadora Process. However, apart from the vital question of how realistic it was to expect the Contadora Process to discharge this responsibility, it is important to note that Article 24 of the U.N. Charter clearly states that the "[m]embers confer on the Security Council primary [i.e., not exclusive] responsibility for the maintenance of international peace and security;" also that, thirty years ago, the United States itself argued vigorously this non-exclusive interpretation of Article 24 to support the successful Uniting for Peace Resolution giving peacekeeping powers to the U.N. General Assembly. Now the United States argues in reverse direction, ironically reiterating the Soviet Union's contentions of thirty years ago. In so doing, it also argues contrary to the ruling that it championed and that was actually rendered in the manifestly "political" Iranian Hostages Case. Patent violations of international law are simply not classifiable, properly, as political questions.

c. Claim that the I.C.J. is a Threat to U.S. National Security

Finally Judge Sofaer argues (p. 11) that, following the World Court's assumption of jurisdiction in the Nicaragua case, "acceptance of the Court's compulsory jurisdiction [became] an issue of strategic significance." He states (at p. 13):

> To the extent that the Court were to make decisions that limited our ability to confront Soviet expansionism, we would be bound by those principles even

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> though the Soviets could and would do as they pleased.

In short, because not all States -- in particular the Soviet Union -- do not accept the Court's compulsory jurisdiction, the United States, in doing so, would be surrendering this nation's right to guarantee the safety and security of its people and allies.

We respectfully disagree. Putting aside the validity of the implied proposition that U.S. national security is threatened in Nicaragua, such an interpretation of the U.N. Charter and the Statute of the International Court of Justice strains credibility. No one, least of all the Major Powers, ever has expected or intended that World Court decisions would or should impair "the inherent right of individual and collective self-defence" guaranteed by U.N. Charter Article 51. Moreover, though we never would endorse the United States vetoing a World Court judgment, both because such an action would likely be contrary to U.N. Charter Article 27 and because it would establish the United States as the moral equivalent of the U.S.S.R., it must be candidly acknowledged that the United States, as a superpower and permanent member of the Security Council, enjoys advantages not readily available to other sovereign States. In short, the United States would be in no strategic danger from accepting the compulsory jurisdiction of the World Court. Furthermore, if the aim of the United States is to end Soviet expansionism in part by convincing the Soviet Union of the benefits of the world rule of law, it seems

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doubtful that it will achieve this goal by withdrawing from the Court's compulsory jurisdiction. Pragmatism as well as idealism favors arguing from a posture of moral supremacy.

One further, related point. In connection with the pending Nicaragua case, the United States has contended that acceptance of the World Court's compulsory jurisdiction would have severely compromised the evidence that, the Administration claims, establishes Nicaragua's "aggression" against its neighbors. That is, the pertinent evidence is of such a highly sensitive intelligence character that to have accepted the Court's compulsory jurisdiction would have been to jeopardize U.S. national security interests because it would have required making the evidence public or otherwise available to two judges from Warsaw Pact nations. In response, it may be noted that, by virtue of the precedent Corfu Channel Case, (1949) I.C.J. Rep. 4 (Merits), the United States would not have been obliged to disclose secret information it did not want to disclose nor to disclose the exact source of its information. Furthermore, because of the large amount of pertinent information already publicly and widely known, it is likely that the Court would have been able to gather sufficient evidence without having to resort to highly classified sources. In any event, in keeping with its own rules, the Court would have declined to decide the case had there not been evidence sufficient to support it.

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2. Damaging Political Assessments and Motives

Whatever the official explanations, the real reasons behind the United States withdrawal from the World Court's compulsory jurisdiction would appear to be two. The first suggests political assessments damaging to United States interests; the second, political motives damaging to United States interests.

a. Damaging Political Assessments

The Reagan Administration appears to have concluded that, in the pending Nicaragua case, the World Court will find the United States in violation of international law as generally understood and that the humiliation of this probable judicial defeat can best be reduced by an attack in advance on the World Court itself. Some States have done this in the past, and to most outward appearances they have not suffered greatly as a result, at least not in the short run.

Nevertheless, the Administration's withdrawal action seems extremely shortsighted on at least three critical counts:

first, withdrawing from the World Court's compulsory jurisdiction risks undermining the Administration's efforts to ensure in other settings -- for example, when dealing with arms control, with human rights, with terrorism, or with claims against American foreign investment -- that other governments, including the Soviet Union, fulfill their obligations under international law;

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second, because many Americans want their government to uphold and promote international law, especially when dealing with a small country seeking to determine its own political destiny, boycotting the World Court in the context of Nicaragua risks legitimizing civil protest within the United States, and the more so if the Administration opts also to defy the World Court's substantive ruling in the Nicaragua case, expected in early 1986; and

third, while attempting to deny the World Court any authority to decide any political conflict tends to put the United States on the plane of principle, generally boycotting the World Court is nevertheless more likely to be received as "sour grapes" in relation to our Nicaragua policy, not least among those governments that are sympathetic to Nicaragua's revolution and that now may feel more encouraged to cause the United States some serious diplomatic embarrassment.

Beyond this, in its effort to portray the Hague justices as anti-American, Marxist, or hostile to Western values, the Reagan Administration can scarcely be seen as winning converts to its side. For in fact the reality is quite different. Most informed observers regard the behavior of the World Court as very professional, especially when compared to any other major organ of the United Nations system. Although its fifteen judges are not elected to their nine-year terms without the acquiescence of their own governments, nominations are carefully screened to assure that professional standards are met, and

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overwhelmingly they have been. If anything, as distinguished jurists with a tendency to respect acquired legal rights, the Court has been conservative overall. Additionally, many of the judges hail from countries that are military allies of, or otherwise maintain close ties with, the United States.

b. Damaging Political Motives

Taking into account the overall foreign policy of the United States since 1980 especially, there appears to be yet another explanation for our withdrawal from the compulsory jurisdiction of the World Court, namely, a disturbing inclination to avoid international affiliations and obligations save where they serve the direct and special interests of the United States as defined by the administration in power. The U.S. withdrawal is of a piece with a now long list of foreign policy moves that suggest a preference for unilateral self-help over multilateral cooperation whenever supposed American interests are believed threatened or compromised. In the last several years, the United States has stood alone in the World Health Organization against attempts to improve the usage of baby formula; reneged on a pledge to increase funding for the International Development Association; similarly notified UNCTAD; withdrawn from UNESCO; refused an elaborately negotiated revision of the laws of war; held up and refused to sign an even more elaborately negotiated Law of the Sea Treaty, and later refused to pay U.N. assessed dues for the Treaty's implementation; held that U.N. peacekeeping forces in Lebanon

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were part of the problem rather than, as traditionally understood, part of the solution; and so on.

In fairness, the Reagan Administration's withdrawal action may not be as much of a departure from earlier American practice as at first it might seem. It is hard to know how the Kennedy, Johnson, Nixon, Ford, and Carter administrations would have responded to equivalent challenges, say, from Southeast Asia or the Middle East.

Still, the recent years will be noted for their go-it-alone style, a period during which the United States has moved decisively from being a champion of law and internationalism to being an abettor of an old-fashioned unilateralism that refuses to be tied down by legal restraints, that treats laws like fences, made to be climbed. And nowhere, perhaps, is this better demonstrated than in the reactions of the United States to the Nicaragua case itself. For example, despite the Court's preliminary orders calling upon Washington to "ensure that no action of any kind is taken which might aggravate or extend the dispute submitted by the Court," the United States subsequently issued a trade embargo against Nicaragua, contravening not only the Court order but also Article 14 of a 1958 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. Similarly, despite an obligation under Article 36(6) of the I.C.J. Statute to defer to the Court's jurisdictional finding, the United States chose to boycott the suit and for the next two years to refuse to accept the Court's juris-

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diction in respect of any cases arising from U.S. actions in Central America.

Thus, the withdrawal by the United States from the general compulsory jurisdiction of the World Court is but the latest in a series of foreign policy moves that in the end invites the use of force to resolve international conflicts and signals to all political actors that "justice" is a matter of "winning." As such, it deals a blow to the struggle for enhanced international third-party decision-making techniques and procedures, and it compels at least the thoughtful among us to ask how roughly we really want to act in this nuclear age.

3. The Limits of Presidential Power

There remains a final concern: did the President have the authority to deny to his fellow citizens and their representatives the opportunity to be consulted about this basic reversal of international public policy?

It is, we acknowledge, an open constitutional question whether the Executive Branch can terminate without Congressional approval an international obligation of the sort involved here. Technically, perhaps, our 1946 declaration of acceptance to the compulsory jurisdiction of the World Court did not constitute a treaty commitment stricto sensu and for this reason did not constitute a part of the "supreme Law of the Land" binding upon the Executive Branch. It was, however, adopted by more than two-thirds of the Senate as if it were a treaty and it has in fact been relied upon for thirty-nine

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years by other States to their juridical detriment. Surely, therefore, the Congress had a fundamental institutional concern to be at least consulted about this drastic change of international commitment. And surely, too, in this last half century of expanding human rights law especially, when the United States in particular has championed the universal human right of everyone "to take part in the government of his country, directly or through freely chosen representatives," the American people had the right to be at least advised.

In the withdrawal by the United States from the general compulsory jurisdiction of the World Court we have the negation of a fundamental commitment essential to the integrity and progress of the international system. That integrity and progress is vital to the interests of United States citizens in a peaceful and just democracy. Respect for the rule of law both at home and abroad should have dictated vigorous public discussion and debate at the very minimum.

RECOMMENDATIONS AND CONCLUSION

Mr. Chairman, if one is to take seriously the arguments put forward by the Administration to justify the United States withdrawal from the general compulsory jurisdiction of the International Court of Justice, then it follows that no State should accept that jurisdiction. For the sake of a peaceful and just future, however, we of the Independent Commission on Respect for International Law earnestly hope that such a

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dangerous course will not be taken. The wisdom of binding oneself to the world rule of law transcends national boundaries and interests.

Mr. Chairman, it is well known that the peoples and governments of this planet live today in an increasingly interdependent and interpenetrating global society. It also is well known, however, that this global society is in an extremely fragile state at this historical time, requiring for its general stability and progress -- indeed, its very survival -- a large commitment to the world rule of law. In our view, it is not in our national interest nor in the interest of the world community as a whole for the United States to give even the appearance of contempt for international law. But such an appearance is inherent, we believe, in the act of withdrawal taken by the Reagan Administration on October 7, 1985.

Accordingly, Mr. Chairman, the Independent Commission on Respect for International Law urges that the United States reverse its October 7 decision, that it re-establish itself as a champion of the compulsory jurisdiction of the World Court, and that it make every effort to persuade other governments and peoples to do likewise. Specifically, we urge the United States Government to adopt a new instrument of general adherence to the compulsory jurisdiction of the World Court but without the types of qualifications and reservations which in the past, as the Department of State admits in its own testi-

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mony before this Subcommittee, have weakened the Court and the ability of the United States to resort to it.

In addition, Mr. Chairman, we urge the Congress to reaffirm its support of the world rule of law and, to this end, to support House Joint Resolution 417 of October 8, 1985 calling for the establishment of a bi-partisan "United States Commission on Improving the Effectiveness of the United Nations" which, we understand, could be charged with improving the effectiveness of one of the U.N.'s principal organs, the International Court of Justice. If problems exist in respect of the World Court -- for example, in connection with the selection or character of its judges -- such a bi-partisan commission can investigate the problems, make recommendations to solve them, and thereby enhance the prospects for the world rule of law. The Statute of the International Court of Justice gives the Court the power to suggest amendments. The Court would no doubt welcome all constructive suggestions for its improvement.

Mr. Chairman, the time is long overdue for governments of all political and socioeconomic persuasions to commit themselves to the world rule of law and, to this end, to the enhancement of the International Court of Justice. It is not in the first instance our independence of action that is in jeopardy internationally, but, rather, our world public order. If that order breaks down, our freedom will be lost and so, too, will the prospects for greater justice for all humankind.

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A calm, objective look at the U.S. national interest verifies, we believe, that our full participation in the World Court as well as other international institutions and procedures is a good bargain, win or lose.

We thank you, Mr. Chairman, for the opportunity to make our views known.

Burns H. Weston
Chair, Independent Commission on Respect for International Law (and Bessie Dutton Murray Professor of Law, The University of Iowa)

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APPENDIX 4

PREPARED STATEMENT OF RICHARD N. GARDNER, PROFESSOR OF LAW, COLUMBIA UNIVERSITY

Last month this Administration terminated a forty year old commitment by our country, entered into with the overwhelming support of the Senate, to submit legal disputes to the International Court of Justice at the request of any other country accepting the same obligation. This commitment was terminated without the full consultation and discussion with the Senate that I believe was necessary and appropriate, considering the Senate's direct involvement in the shaping of that commitment.

I also believe the Administration's decision was contrary to the national interest. That interest would have been served better by modifying the terms of our acceptance of compulsory jurisdiction in ways that I shall shortly explain and which are illustrated at the conclusion of my testimony. I hope the Committee will consider urging the Administration to file a new declaration accepting compulsory jurisdiction along these or similar lines.

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Our commitment to accept the compulsory jurisdiction of the World Court was taken by the Truman Administration in 1946 and was maintained by the Administrations of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford and Carter. A reading of the statements by these Administrations on this subject suggests that they were influenced by a number of considerations, some moral and some very practical. These Administrations believed

--that the United States should be a leader in promoting the rule of law in the world;

--that as a law-abiding nation we should be willing to hold ourselves accountable for our actions before an international tribunal upon the request of other countries prepared to do the same;

--that our national security is best served by building up international institutions to promote stability, order and justice in international relations;

--that the International Court of Justice can advance these goals by applying rules of international law in the peaceful settlement of disputes;

--that international law as applied by the Court will, in most cases, be consistent with our interests;

--and that, since our Constitution and laws offer rights and remedies to foreign citizens and corporations greater than most other countries grant to our citizens and corporations, we will have more occasion to go before

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the Court as plaintiff than as defendant.

I believe these reasons made sense then and that they make sense now.

In support of its decision to terminate our acceptance of the Court's compulsory jurisdiction this Administration and those who support its decision have advanced a number of arguments. I do not believe they are persuasive.

First, it is argued that more than two-thirds of the members of the United Nations have not accepted compulsory jurisdiction. But that is no reason why a minority of countries including the United States should not accept compulsory jurisdiction in disputes among themselves if it serves their interests to do so. The United States and like-minded members of a "law bloc" could also work to encourage others to accept compulsory jurisdiction, something we have made no effort to do in recent years.

Second, it is argued that it is unjust for judges whose countries have not accepted the Court's compulsory jurisdiction to decide cases involving countries who do. But the judges of the Court serve in their individual capacities. If they are jurists of ability, integrity and independence, as most of the judges are, the failure of their countries to accept compulsory jurisdiction should not disqualify them.

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Third, it is argued that we have never been able to use our acceptance of compulsory jurisdiction to bring other countries before the Court. But this is our own fault. The Connally reservation to our acceptance of compulsory jurisdiction made an exception for matters within our domestic jurisdiction as determined by ourselves.

We could have employed this self-judging reservation to bar Nicaragua's suit against us in the World Court, but did not do so because we were ashamed to argue that mining another country's harbors and supporting insurgents seeking to overthrow its government was a matter within our domestic jurisdiction. Yet under the reciprocity clause in the Court's statute, the reservation can be and has been invoked against us as an absolute bar to litigation by countries using it in good or bad faith. The remedy for this self-inflicted injury is not to terminate our acceptance of compulsory jurisdiction but to eliminate the self-judging reservation that effectively denies us the benefits we thought we were getting when we took the original commitment. The proposed reservations at the close of this testimony include a change in the Connally reservation to accomplish this.

Fourth, it is argued that the Court overstepped its powers and thus demonstrated its lack of responsibility in taking jurisdiction in the case Nicaragua has brought

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against us, because this case is a "political" matter and therefore inadmissable. This is exactly the argument which the Khomeini government of Iran asserted against us in the hostages case and that both we and the Court rightly rejected.

The fact is that many controversies before the Court are both legal and political. There is nothing in the Statute of the Court or in the United Nations Charter that prevents the Court from deciding such cases provided it confines itself to adjudicating the legal issues. Indeed, Article 36(3) of the U.N. Charter which deals with disputes that endanger international peace and security, provides that "legal disputes should as a general rule be referred by the parties to the International Court of Justice." It is therefore not surprising that our argument on the inadmissability of Nicaragua's claim was rejected by every one of the judges of the Court, including Judge Schwebel of the United States.

Fifth, it is argued that the Court exceeded its powers in the Nicaraguan case by taking jurisdiction in a controversy involving armed conflict and the rights of a country to individual and collective self-defense. But here again, there is nothing in the Court's Statute or in the U.N. Charter to support this claim, nor is there

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any support in the practice of the Court and of the United States itself. Since 1945 thirteen cases have been brought before the Court involving the use of armed force, eight of them by the United States, three by the United Kingdom, and one by Israel. Nicaragua's was the thirteenth.

Nevertheless, though the Court has the power to decide such cases, it must be recognized that where armed conflict is continuing it may be difficult or impossible to determine the facts. Moreover, international law concerning aggression and self-defense and intervention in civil war situations is so controversial, and the national security interests of states so paramount, that it is simply not realistic in the present state of international relations to expect nations to accept decisions of an international tribunal on the legality of their behavior in armed conflicts in which they are or have been involved. Reservation (d) at the end of my statement therefore makes an exception for such cases, while preserving the rights of nations to bring other cases to the Court arising out of individual acts of terrorism or violence such as the occupation of our Embassy in Teheran. I concede that this reservation carves out a big exception to compulsory jurisdiction, but it still leaves a vast area where compulsory jurisdiction can be effective.

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Finally, it is argued that the judges of the Court are not impartial and independent jurists but that a majority of them are politically biased against the United States.

On this subject it is necessary to speak with care and precision. The World Court does not behave like the U.N. General Assembly. It is composed in the main of respected jurists and its opinions are based on careful reasoning and scholarship. Seven of its judges come from countries allied to the United States (four from NATO countries, one from Japan, two from Latin America). These judges are all friendly to our country and perform their judicial functions with competence and independence. Together with the outstanding American judge, Stephen Schwebel, they account for a majority of eight members in a Court of fifteen.

On the other hand, the independence of the Soviet judge is certainly open to question, and it would be naive to expect him not to take the Soviet view when Soviet and American interests are in conflict. National pressures also weigh heavily upon the judges from Poland and Algeria. The two judges from Africa, the Indian judge, and the new judge from China are eminent jurists, though their views on international law may diverge from our own more frequently than those from the Western nations and Japan.

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All in all, it is a less than perfect tribunal from our point of view, as any truly international court representative of the world's main legal systems is bound to be. But I do not believe that the record of the Court so far indicates that it is biased against us or that its interpretations of international law are unreasonable.

If in the future the behavior of some of the judges were found to tilt the balance of the court in ways that are adverse to our interests--a conclusion I do not believe to be justified at this time--there is a better remedy than rejecting the Court's compulsory jurisdiction. We could condition our acceptance of compulsory jurisdiction on our right to have any case to which we are a party decided by a chamber of the Court composed of judges acceptable to ourselves. But before we try this remedy we should recognize that under the reciprocity provision an unwilling defendant country against whom we are bringing a case could claim the same right and could defeat the Court's jurisdiction by declining to accept any combination of judges acceptable to us. There is also the possibility that the Court would hold such a reservation to be incompatible with the acceptance of compulsory jurisdiction, although I believe this is unlikely. For these reasons, I have included a reservation on chambers at the end of this testimony only as a possi-

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bility for the future, not as a remedy to be adopted now.

The other proposed reservations which are set out below cover more technical matters. I have proposed that we be in a position to terminate our acceptance of compulsory jurisdiction immediately, without any notice requirement. To assure that we are not subject to "hit and run" actions by countries who accept the Court's jurisdiction only for the purpose of sueing us, I have included a reservation modelled on one adopted by the United Kingdom some years ago. I have also dropped the so-called "Vandenberg reservation" because its meaning is unclear and because the Court's own Statute and rules provide adequate opportunity for other parties to multilateral treaties to intervene in disputes to which they are also parties involving the interpretation of such treaties.

Taken together, I believe the proposed reservations would adequately protect our national interest as a defendant before the Court, while still permitting us to use the Court to vindicate our rights and to benefit from the contributions--admittedly long-term--that the Court can make to a more just and stable world order.

In the last analysis, our conclusions about the desirability of accepting the Court's compulsory jurisdiction must result from a realistic calculation of the balance

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of benefits and risks. I do not accept the view that our adherence to the Court's compulsory jurisdiction could endanger our national security. This argument is based on the wholly unrealistic assumption that some future Administration would refrain from taking an action that it considered essential to the national security because of an adverse decision by the World Court. We all know that no nation, including our own, behaves that way.

In situations of crisis, our action will almost always take place before the Court's procedures allow it to reach a decision. Moreover, if the decision is unacceptable to us in a vital national security matter we will ignore it, and our veto in the Security Council protects us from any U.N. effort to enforce it.

Of course, I am not suggesting that we should be in the habit of ignoring decisions of the International Court. I am simply saying that in the remote contingency that the Court decides against us on a vital national security matter (armed conflicts having already been reserved), the political cost of disobeying that decision would be less than that of denying ourselves completely the possibility of invoking the Court's compulsory jurisdiction against other countries.

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To sum up, I believe there is a way for our country to reap the benefits of compulsory jurisdiction--benefits that all previous Administrations have found substantial--without jeopardizing any important national interest. I hope these hearings will help develop a consensus on the best way to achieve this important objective.

Richard N. Gardner holds the Henry L. Moses chair of Law and International Organization at Columbia University, where he has taught international law since 1957. He has served the U.S. Government as Deputy Assistant Secretary of State for International Organization Affairs and as U.S. Ambassador to Italy.

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Proposed Reservations to a New Declaration of U.S. Acceptance of the Compulsory Jurisdiction of the International Court of Justice

Provided, that this declaration shall not apply to

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters that by international law fall within the domestic jurisdiction of the United States of America; or

(c) disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute or where the acceptance of the Court's jurisdiction by another party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court; or

(d) disputes relating to international or internal armed conflicts or to actions taken by the United States in the exercise of individual or collective self-defense or in accordance with decisions of regional

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organizations; provided, however, that this reservation shall not be deemed to cover actions not justified by military necessity against ships and aircraft, diplomatic and governmental agents and government property, or private citizens and their property; and

Provided further, that this declaration shall remain in force until notice may be given to terminate or amend this declaration.

Possible Additional Reservation

Provided further, that any case brought by any party against the United States of America on the basis of compulsory jurisdiction in accordance with this declaration shall be decided by a chamber of the International Court of Justice composed in accordance with Article 26 of the Statute whose membership is acceptable to the United States.

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